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THE

CANADIAN

LAW TIMES

EDITED BY

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THE

CANADIAN LAW TIMES.

JANUARY, 1900.

THE CONTRACTS OF RAILWAY COMPANIES LIMITING LIABILITY.

THE question calling for consideration in the present article is the difficult one of the extent of a railway company's liability as carrier of passengers and goods, in view of the provisions of the Railway Acts of Ontario and Canada which say that a railway company shall not be relieved by any notice, condition, or declaration, if the damage arises from negligence or omission of the company or its servants.

In order to discuss this subject intelligently, it will be necessary to take a short review of the history of the law affecting carriers, before its enactment, and to refer to corresponding but not identical English provisions which govern cases frequently cited in our Courts.

The law affecting carriers has always been in an anomalous condition, as their liabilities for many years were not governed only by the terms of a contract or by the general law of negligence where no agreement exists, but by certain peculiar and stringent rules enunciated two centuries ago. Its history is best summed up by Sir John Beverley Robinson in Ham v. McPherson (*a*), where he says: "It seems to have been at first a general principle of common law applying to the case of common carriers, as well as to bailees for hire, that they were to take reasonable care of the goods intrusted to them, and were to be liable only for losses arising from their neglect;

(a) 6 O. S. at p. 363.

but afterwards, for the security of persons engaged in commerce, it was laid down and maintained as a principle that a common carrier should be held liable for goods delivered to him to carry in all cases except where the losses occurred from the act of God or the King's enemies, by which latter is meant the public foreign enemies of the King, for carriers are liable in case of the destruction of the goods by the irresistible violence of rebels and rioters."

There is a third exception to the carrier's general liability, namely, where the damage to the article carried arises from some defect or vice inherent in the thing itself. The authority for this third exception is Nugent v. Smith (*b*), decided in 1865, and therefore long after Sir John Robinson's decision. With these three limitations, carriers are at common law insurers of the goods they profess to carry for hire.

It is stated by that learned Judge that the rule he enunciates is as old as Queen Elizabeth; and Lord Holt, in Coggs v. Bernard (*c*), refers to and relies upon Mors v. Slue, decided in 26 Car. II., reported in Raymond at p. 220 and 1 Vent. 190 and 238.

In support of the proposition under discussion Lord Holt quotes the civil law, and therefore the rule lying at its root has all the respectability of a very hoary antiquity. The reasons given are those referred to by Powell, J., and Lord Holt, the latter saying: "That it was contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity for undoing all persons that had any dealings with them by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered—" a line of argument which does not pay a high compliment to the carriers of Lord Holt's time, and recalls thrilling tales of those days when the stage-coach driver and the highwayman were in league to beset the adventurous traveller and despoil him of his goods.

(*b*) 1 C. P. D. 423.
(*c*) 1 Sm. L. C., 9th ed., p. 354.

Powell, J., in the same case, says that, while not liable for damages arising from the act of God or the King's enemies, a carrier is liable for other accidents, because he has his remedy over against the person causing them, as in the case of goods stolen from him, where "an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies."

But, however strong the necessity for such a rule might be, the desire to promote the public welfare, and to protect their patrons against their nefarious connivances with thieves was not felt by people who, as common carriers, were bound to accept all goods which they professed to convey upon a tender thereof, and the price of carriage, to such an unusual extent that they did not attempt to escape from its results either by notice given to all consignors with more or less publicity, or by entering into a special contract when receiving the consignment. Provided that the carrier could show that the notice or contract came to the knowledge of the consignor, he would then be absolved from liability to pay damages arising from any of the excepted risks, and this extended to his own negligent acts, and those of his servants, if the contract was sufficiently explicit (*d*).

If the owner could show that he received no consideration for the exemption he granted other than the promise to convey the goods, it has been suggested, but apparently not authoritatively decided, that, as the carrier was bound by law to carry them anyway, the exemption granted would fail for want of consideration (*e*), and it has also been held that a carrier may be sued in tort for damages where he refuses to convey goods which he professes to carry, unless a special contract is signed, if the owner can prove tender of the goods and of a reasonable compensation (*f*); but at common law in other cases the owner had no option but to sign the agreement presented to him, or keep his goods at home. Except in the

(*d*) Hinton v. Dibbin, 2 Q. B. 646; Hamilton v. Grand Trunk R. W. Co., 23 U. C. R. 600; Bates v. Great Western R. W. Co., 24 U. C. R. 544; and Spettigue v. Great Western R. W. Co., 15 C. P. 315.

(*e*) Richards, J., in Sutherland v. Great Western R. W. Co., 7 C. P. 409.

(*f*) Leonard v. American Express Co., 26 U. C. R. 533.

case of railway companies, this is practically the law now, and a carrier may, by a special contract, escape liability for damages arising even from his own negligence (*g*).

The liability at common law of carriers of passengers must next be considered to enable us to grasp the scope of our own and the English legislation.

Presumably because carriers could never connive with highwaymen or footmen to expose their human freight to risks which attended the transportation of goods, the former were not liable in cases of injury at all events; but before his "fare" could recover it was necessary to prove that the carrier had been negligent. Curiously enough, this rule has none of the antiquity of that relating to goods, for, though it had been pretty well assumed, a "leading case" was not forthcoming until 1867, when Redhead v. Midland R. W. Co. (*h*), decided the point; and the decision received further sanction in the Court of Appeal (*i*). The law as there decided is that "a carrier of passengers for hire is bound to use the utmost care and skill in everything that concerns the safety of the passengers, but he is not bound at his peril to provide a carriage road-worthy at the commencement of the journey, and if the carriage turns out to be defective, he is not liable to a passenger for the consequences, if the defect was of such a nature that it could neither be guarded against in the process of construction, nor discovered by subsequent examination."

The rule deduced from the cases is, that the passengers must prove some negligence on the part of the carriers, and this rule received the judicial sanction of our own Supreme Court in Chalifoux v. Canadian Pacific R. W. Co. (*j*), in which the Redhead case and some American decisions are relied upon. The necessity for caution is, however, so strongly insisted upon, that, for all practical purposes, a railway company at least must find it difficult to devise a scheme by which it can injure passengers with greater impunity than their possessions. At common law, however, carriers could also

(*g*) Dixon v. Richelieu and Ontario Navigation Co., 15 A. R. 647, 18 S. C. R. 704.

(*h*) L. R. 2 Q. B. 412.

(*i*) L. R. 4 Q. B. 379.

(*j*) 22 S. C. R. 721.

make a special contract relieving themselves from negligence towards passengers, provided they could show some consideration moving from themselves to him, and induce him to waive his common law right of being carried carefully (*k*).

The above is in outline the position of the law affecting common carriers, until it was altered by statute.

It was found in England that carriers were, by all kinds of more or less public notices and special contracts, limiting their liability while taking the usual hire for carriage, and one or two attempts to regulate what was regarded as a hardship upon the public, were made, first by 1 Will. IV. cap. 68, prohibiting the use of public notices as a means of limiting liability, and afterwards by the Railway and Canal Traffic Act, 17 & 18 Vict. cap. 31, which by sec. 7 provided that every company within its scope should be liable for any loss or injury to goods intrusted to its care occasioned by the neglect or default of the company or its servant; notwithstanding any notice, condition, or declaration limiting its liability; and any such provision is to be null and void, provided that the company is not to be prohibited from making such conditions as may be adjudged by the Court to be just and reasonable.

These provisions were never enacted in Ontario, nor were they the subject of Dominion legislation, and for many years after they existed in England the rights of carriers and consignors in Canada were subject only to the provisions of the common law. As authority for this statement, see the Sutherland case, already referred to. Indeed, ordinary carriers, such as those by water or stage-coach, are not yet the subject of legislative regulation, except so far as the former are within the scope of R. S. C. cap. 82, but, as the legal position of these carriers is not within the limits of the present discussion, the effect of the last named statute is not further considered.

Railway companies, when they came into existence, adopted the practice of those whose business they usurped, and protected themselves by all sorts of conditions from every

(*k*) Sutherland v. Great Western R. W. Co., 7 C. P. 409.

kind of accident or misfortune that was likely to befall property intrusted to their care, and, as they gradually monopolized the land-carrying trade, the need of parliamentary regulations of conditions limiting liability was more and more insisted upon. Yielding to popular demand and judicial suggestion (*l*), the Dominion Parliament finally followed the Imperial example, and in 1871 passed the provision which has already been in substance quoted, namely, that "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any neglect or omision of the company or its servant." The bill as introduced into the House was almost a reprint of the English Act, but it was referred to a committee, and there underwent a complete metamorphosis. The difference between it and the English statute is dealt with by Mr. Justice Osler in Vogel v. Grand Trunk R. W. Co. (*m*), and Cobban v. Canadian Pacific R. W. Co. (*n*), and by Sir William Meredith in the Cobban case (*o*). In addition to what is there stated, it may be remarked that the English Act applies only to the carriage of goods, while ours is general in its terms. This clause is now found in sec. 246, sub-sec. 3, of 51 Vict. cap. 29 (D.), and in sec. 41, sub-sec. 4, of R. S. O. cap. 207.

The foregoing remarks furnish an outline of the law affecting carriers down to the time when the statute imposing a restriction upon the contracts of railway companies was passed. But there is one collateral matter, the liability of carriers as warehousemen, which has been somewhat affected by the same statute, and it will be necessary briefly to refer to it before passing on to a consideration of the cases which have arisen out of the Act.

Carriers are paid for the transportation of goods, but not for their safekeeping at either end of the journey, unless their

(*l*) See Hamilton v. Grand Trunk R. W. Co., 23 U. C. R. 600, and Bates v. Great Western R. W. Co., 24 U. C. R. 544.

(*m*) 10 A. R. 162, at pp. 184 and 189.

(*n*) 23 A. R. 115, at p. 119.

(*o*) 26 O. R. 732, at p. 745.

contract so provides, or the carrier is himself guilty of some act whereby the goods remain in his possession during a period which was not occupied in their transportation. Consequently the law has never fixed the carrier with the liability of an insurer when the goods have reached their journey's end, and all legal steps have been taken to enable the consignee to get them. Having done all that he was paid for, he would then become a gratuitous bailee (depositary) and liable only for gross negligence under Coggs v. Bernard, but in the case of railway companies and other forwarders the contract of carriage generally provides for payment of storage charges where there is delay in taking delivery, so that usually they become bailees for hire, and liable for loss occasioned by their negligence, except where there is an express provision to the contrary, but not liable at all events. There are numerous cases decided on this point, but a reference to the very valuable judgment of Sir John Beverley Robinson in Ham v. McPherson (*p*), already cited, and to Milloy v. Grand Trunk R. W. Co. (*q*), will suffice for present purposes. The same right of limiting liability by means of a contract existed and still exists in favour of most warehousemen, and, as it will be afterwards submitted, the wording of the Railway Acts is not sufficiently wide to invalidate a condition relieving railway companies from their negligence, where the negligent act occurred whilst they filled the position of warehousemen only.

The situation then has been since 1871 that railway companies may receive goods for carriage upon any terms they like, and may contract themselves out of liability as much as they please; but once a shipper or consignee proves that they have been negligent he may recover all damages he has sustained thereby in spite of the most cast-iron, small print condition that ever threatened the eye-sight of those condemned to read it. This sweeping effect is the more surprising, since, in most directions, the law has extended the liberty of contract to an extent unheard of in the days of specialty debt and actions of assumpsit, and one is tempted

(*p*) 6 O. S. 360.
(*q*) 23 O. R. 454 and 21 A. R. 404.

even now to engage in what would be a purely academic discussion as to the advisability of substituting machinery for properly informing shippers of the nature of the contracts they are signing, instead of taking away from them their power of defining their rights and liabilities as they see fit.

But we are now concerned with the law as it is, and this calls for a review of certain principles enunciated since our own and the English statute were passed. The first necessity is to define as far as possible the lines within which this statutory limitation operates.

It is to be observed:—

(*a*) That it does not prevent the carrier from throwing the onus of proving negligence upon the shipper.

(*b*) Nor deprive him of his common law defences that the loss was caused by the act of God, the Queen's enemies, or some inherent defect in the article carried.

(*c*) Nor oblige a carrier to assume responsibility for connecting lines.

(*d*) Nor take away the defence of contributory negligence.

(*e*) Nor prevent him from limiting beforehand the measure of damages that may be recovered, even if negligence is shown.

(*f*) Nor from prescribing certain conditions precedent to the issue of a writ.

(*g*) If it can be shown that the negligence relied upon by the plaintiff is not within the scope of the section, a condition aptly worded may be a defence even against such negligence.

There is also the further question whether the section under discussion is not modified by other clauses in the same Act, and whether the railway company cannot, for instance, by granting another and lower rate, stipulate for exemptions which it could not exact if it carried goods for the ordinary fare. It is assumed in discussing all these points that a contract has been made, limiting liability as far as the law allows, for if there is no contract, the liability is at common law.

It must here be noticed that where a railway company sets up as a defence a contract limiting its liability, it must be

prepared to show that it was acting in performance of that very contract if it would take advantage of its terms. Thus, where a company agreed to forward goods by a certain route, but only at the owner's risk for delay, the question whether such a contract was just and reasonable, under the English Act, was not even reached, because it was shown that by mistake the goods were sent by another route, and thus the contract never came into operation, "as the delay arose in consequence of the defendants doing something which was wholly at variance with the contract" (*r*).

Passing this pitfall, however, we next notice that the statute does not restore the shipper to that happy condition when all he had to do was to prove his delivery and damage, and leave the carrier to prove affirmatively that he was not negligent. There being a contract, and that contract relieving him from liability, the positions are reversed, and the plaintiff must show affirmatively that there was neglgence. This is not the view arrived at by Mr. Justice MacMahon in Cobban v. Canadian Pacific R. W. Co. (*s*), but his opinion is not shared by the other members of his Court, and, while not expressly disavowed by the Court of Appeal, the judgments of the three learned Judges who there decide the appeal, all seem to proceed upon the assumption that actual negligence must be proved, and that mere proof of non-delivery does not raise such a presumption of negligence where there are conditions limiting liability as to throw the onus on the defendants. The remarks of Sir John Hagarty in the same case, where he cites Vogel v. Grand Trunk R. W. Co. (*t*) as authority for the remark "that the company could not, under the circumstances of that case, contract themselves out of liability for proved negligence," suggests strongly the necessity of showing some negligent act or acts, and in fact a new trial was granted to enable the plaintiff to show negligence, which it was finally held had not, up to that time, been proved (*u*).

(*r*) Mallett v. Great Eastern R. W. Co., [1899] 1 Q. B. 309.
(*s*) 26 O. R. at p. 760.
(*t*) 11 S. C. R. 612.
(*u*) See also Czech v. General Steam Navigation Co., L. R. 3 C. P. 15.

It is also submitted with deference that the authorities referred to by Mr. Justice MacMahon have reference to the common law liability of carriers as insurers, and not to the statutory liability of railway companies. In some cases, of course, the fact of an accident to goods or passengers might afford a pretext for applying the maxim *res ipsa loquitur*, but it is submitted that this maxim is not imported into the statute, nor does it follow as a necessary incident of its enactment, and so far as it may be invoked in any particular case its operation is governed by ordinary principles of law, and does not logically enter into this discussion. In the case of passengers, as negligence had always to be proved, there is even stronger ground for inferring that where negligence, under the statute must be shown in order to vary the terms of a contract, that negligence must be affirmatively proved, though, to adopt the language of Sir William Ritchie in Canadian Pacific R. W. Co. v. Chalifoux (*v*), "if an accident happens to a passenger on a line of railway either by the carriage breaking down or running off the rails, that is prima facie evidence from which the jury may infer negligence on the part of the railway company, and must be rebutted by evidence on the part of the defendants." This rule may be regarded as an instance of the application of the maxim *res ipsa loquitur* to a particular state of facts, and suggests an instance where proof of the accident would be sufficient evidence of negligence to bring the statute into operation, and annul a contract relieving from liability; but it does not weaken the proposition that negligence must be proved by the man who seeks to escape from the effect of the contract he has made.

Reverting to the propositions already advanced, it is suggested that the statute does not (b) deprive him, the carrier, of his common law defences that the loss was caused by the act of God, the Queen's enemies, or some inherent defect in the article carried.

Of course a carrier may contract, either expressly or by implication, to insure the goods he carries against the perils excepted at common law, and there is nothing to prevent him

(*v*) 22 S. C. R. 721 at p. 730.

from increasing his liability to any extent that caprice or keen competition may induce him to do; but, in dealing with the proposition as stated, the possible reader is asked to assume either that these defences are not expressly or impliedly named, or that the contract expressly reserves them.

The leading modern case which discusses these defences is Nugent v. Smith (*w*), and a reference to this case and to Coggs v. Bernard will supply definitions too valuable to be abridged, but too long to quote in this article. For our purpose the value of the former case is that it collects for us the learning upon the question of who are common carriers, and quoting from Mr. Justice Storey's book on Bailments, it defines a common carrier as "one who undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place" (*x*). Railway companies are within the terms of this definition, and there are further innumerable decisions in which that fact has been assumed. They are therefore entitled to the usual defences open to common carriers, and are not deprived of them because of the existence of a special contract.

As an instance of this the case of Blower v. Great Western R. W. Co. (*y*), may be cited. In that case a railway company agreed to carry a bull, which during transit escaped from the car and was killed, not owing to any defect in the car, but from causes solely due to the animal's dislike to its surroundings, coupled with sufficient energy to induce it to try and escape from them; propensities which are rather unkindly described in the report as "vice." There were special conditions which, however, did not cover this particular case. It was held nevertheless that the loss was caused by a vice inherent in the thing carried, and therefore the common law rule so fully expounded in Nugent v. Smith applied, and the plaintiffs failed. The existence of the conditions was not expressly referred to, but if they or the statute limiting their scope had in any way destroyed the common law relations between the parties, one may be sure that so great a Judge as

(*w*) 1 C. P. D. 19 and 423.
(*x*) 1 C. P. D. at p. 26.
(*y*) L. R. 7 C. P. 655.

Mr. Justice Willes, who wrote the principal judgment, would not have assumed as he did that the common law was still applicable. This rule is further illustrated by the case of Kendall v. London and South-Western R. W. Co. (*z*), in which, though there was a special condition exempting from liability for a horse kicking and plunging which was held not to apply, the majority of the Court nevertheless decided that at common law the defendants were not liable for injuries solely due to the horse's actions.

The next limitation to the rule, that catalogued as (c), is that the provision under discussion does not compel a railway company to assume responsibility for negligence over lines other than its own. But, while there is no obligation to assume such a liability, the form of the contract must be carefully scrutinized to see whether the railway company has not actually done so. If the latter says to the shipper, "I will carry your goods from Toronto to Quebec," it is liable for damage occasioned anywhere during transit by negligence, even though its own line runs to Montreal only, and the goods are carried the rest of the way by some connecting line; but if the railway company says: "I will carry your goods to Montreal, and acting as your agent will deliver them to my connections for carriage to Quebec," it will not be liable for negligent handling after the goods have left its control at Montreal.

The shipping bills, as they are called, usually now provide carefully for this, but it took some judicial discussion to fully teach railway companies the distinction. Where it is observed, the effect is that the connecting line becomes directly liable to the shipper for any damage due to negligence on its part, and with this additional term, that it cannot avail itself of the special conditions exacted by the preceding carrier unless the shipping bill expressly provides, as all well drawn ones now do, that such conditions shall enure to the benefit of all connecting lines. This was decided in Lake Erie and Detroit River R. W. Co. v. Sales (*a*).

Upon the main proposition now under discussion the judgment of Mr. Justice King in Northern Pacific R. W. Co. v.

(*z*) L. R. 7 Ex. 373.
(*a*) 26 S. C. R. 663.

Grant (*b*) gives a short and clear summary of the law. "Under English law, differing in this respect from American law, a company receiving goods for carriage to a point beyond its line, prima facie contracts for the entire carriage. But it may limit its responsibility to acts or defaults occurring upon its own line, and where that is done each carrier in succession comes under an obligation to deliver goods so received to the next carrier." Similarly, each carrier is bound to carry goods without negligence upon its own line, and where it does not do so it becomes liable. A leading case upon this branch of the subject in Canada is McMillan v. Grand Trunk R. W. Co. (*c*), in which it was finally decided that while a railway company is prima facie liable during the whole transit as already stated, connecting lines being its agents, nevertheless, as no carrier is legally bound to carry further than his own lines, the statute in question did not prevent it from restricting its liability for negligence as carrier or otherwise, to damages arising while on its own line only. Sir Henry Strong explains the principle at p. 551 of the Supreme Court report as follows:—"Then these duties and obligations"—those of exercising care and guarding against negligence—"were clearly prescribed in respect of a railway company's own line, and not with respect to other lines over which it might if it chose undertake to forward or carry, but in respect to which services its choice to undertake them or not, was free and unaffected by any statutory duty whatever."

The other cases upon this point are not more particularly referred to here, as they are collected and discussed in the cases cited.

(To be concluded.)

SHIRLEY DENISON.

TORONTO.

(*b*) 24 S. C. R. at p. 548.
(*c*) 12 O. R. 103, 15 A. R. 14, 16 S. C. R. 543.

HISTORY OF THE COURT OF CHANCERY IN NOVA SCOTIA.

The Court of Chancery in Nova Scotia was constituted simultaneously with the Courts of Common Law at the foundation of Halifax in the year 1749. The commission which authorized Cornwallis to create Courts of Justice in the Province and the accompanying Royal Instructions conferred the powers necessary for that purpose. Clause 10 of the Royal Instructions reads as follows:

"It is therefore His Majesty's will and pleasure that one principal Court of Judicature should be held twice a year, or oftener as you shall judge expedient, by the name of the General Court, and to have the jurisdiction of all causes real and personal at common law above the value of five pounds, to act as a Court of Chancery, but not without appeal to his Majesty when the matter in question shall exceed three hundred pounds sterling, as also to try all criminal cases that may come before the said General Court, which said Court, it is his further will and pleasure, should consist of the Governor, or Commander-in-Chief, and the Council of the said Province for the time being, any five whereof is a quorum."

By virtue of this authority the Governor with the assistance of his Council for several years, and subsequently without the members of Council, exercised Chancery jurisdiction until the first Master of the Rolls was appointed by Royal Commission in 1852. His full title was Governor and Commander-in-Chief in and for the Province of Nova Scotia and its dependencies, Chancellor, and Vice-Admiral of the same. In all the Chancery records preserved when the Court sat as a Court of Chancery for the trial of equitable suits his name is entered on the record as "The Chancellor."

Stoke in his book on the Colonies says:

"Every Governor of the Province by his commission is (1) Captain-General of the Forces. (2) Its Governor-in-Chief

is one of the constituents of the General Assembly. (3) The Governor has the custody of the Great Seal, and is Chancellor within the Province with the same powers of judicature that the Lord High Chancellor has in England. (4) He is ordinary within his Province. (5) He presides in the Court of Error, of which he and the Council are Judges, to hear and determine all appeals in the nature of writs of error from the Superior Courts of Common Law in the Province. (6) The Governor is Vice-Admiral within his Province, but does not sit in the Court of Vice-Admiralty, there being a Judge of that Court who is usually appointed from England."

In my former paper I detailed the several steps taken by our early Governors for separating the judicial from the executive functions of the Council, by first erecting the County Courts, afterwards styled "The Inferior Court of Common Pleas," and secondly, by constituting the Supreme Court, with Chief Justice Belcher at its head, thus superseding the jurisdiction of the Governor and Council, up to that time exercised as "The General Court" in all common law actions. The residuum of judicial power originally committed to the Governor and Council as a Court of Chancery was still retained, and was regularly exercised until the appointment of the first Master of the Rolls, when the Governor ceased to hear and adjudicate in equitable matters except when coming before him as Chancellor by way of appeal.

Haliburton, who wrote the History of Nova Scotia in 1829, makes a brief reference to the Court of Chancery in the following terms:

"The Governor is Chancellor in office. The union of these two offices is filled with difficulties, and when the Governor is, as has been the case in all the Colonies of late years, a military man, they seem wholly incompatible . . . The Court of Chancery in this colony has never been conducted in a manner to create the dissatisfaction alluded to in other Provinces, but the increased business of the Court, the delicate nature of the appointment, and the difficulties attending the situation, induced our late Lieutenant-Governor, Sir James Kempt, to request his Majesty's Ministers to appoint a professional man to fill the situation of the Master of the

Rolls, and the Solicitor-General has been appointed to that office, with a Provincial salary of £600 a year. This is the first appointment of the kind ever made in the Colonies. It may still be doubted whether it would not have been more advantageous and convenient to the country at large to have abolished the Court altogether, and to have empowered the Judge of the King's Bench to sit as Judge in Equity at stated and different terms from those of the Common Law Court. The nature of the Court as at present constituted admits of great delays. An appeal lies from an interlocutory decretal order of a Chancellor to His Majesty in Council and so toties quoties, by means of which the proceedings may be protracted by a litigious person to an indefinite length. The unnecessary prolixity of pleadings which characterises the Chancery at home has been introduced into practice here, and the expense and delay incidental to its proceedings are not calculated for the exigencies and means of the country."

The lapse of time, together with the great and radical changes effected in our judicial procedure by legislation, has left the profession of to-day in almost total ignorance respecting the old Court of Chancery, when our Governors were the Chancellors. How that jurisdiction was exercised, what practice was adopted, and the nature of the litigation coming before the Court, it may safely be said, is at the present time unknown. No book has ever been written on the subject, and no continuous record easily accessible has been kept. Those which remain have been stored away in the lumber rooms of the Court House, covered with the dust of many years, rendering any study of their contents a work of great difficulty and patience. Until the researches which led to this paper were undertaken, I had the impression which generally prevailed among those who thought on the subject at all, that the equity administered in that Court was of a very crude character—in legal slang, "was measured by the length of the Chancellor's foot," which interpreted would mean, according to the Chancellor's own peculiar notions of what was just and equitable. An examination of the Chancery records and Chancery papers in the archives of the County Court House will rapidly dispel this erroneous conception, and show it to have been a mistake due to the mists surrounding the whole subject. It is one of the objects of this paper

to throw some light on the procedure and doings of this high tribunal, which in the past played an important part in our judicial annals. The abolition of the Court of Chancery, nearly fifty years ago has led to its existence being almost forgotten. The solicitors and counsel who practised before the Court have now all, or nearly all, passed away. The busy life of succeeding practitioners has given to them little or no leisure to study the history and preserve the traditions of a tribunal no longer useful or valuable to their practice. This alone is sufficient to explain the indifference which has prevailed, and the obscurity which has gradually and imperceptibly enveloped everything relating to the Court. Nothing was known as to the mode in which the Governor exercised his jurisdiction as Chancellor, nor as to the practice and procedure adopted—not even the nature of the suits and other equitable matters which came before him. The Governor was generally, if not always, a layman, unversed even in the common law—and much less in equity jurisprudence. Hence came the natural and important inquiry, how was it possible for an untrained layman to properly adjudicate in equitable matters? It is a notable fact, disclosed by an examination of the provincial statutes, that prior to the appointment of the Master of the Rolls in 1825 no legislation of any kind affecting the Court of Chancery was passed with the exception of two Acts regulating the costs and fees to be taken by the officers of the Court. During the same period many Acts of importance were passed in reference to the Supreme Court, the Inferior, and other Courts, dealing with their jurisdiction and procedure, while the Court of Chancery seems to have escaped all legislative interference. It can only be conjectured that this was due to the belief that the Chancellor's jurisdiction was beyond the scope of legislative action, or that the Court gave such general satisfaction that legislation was unasked for.

The record books of the Court of Chancery have been preserved in which the proceedings are carefully transcribed from the first beginning in the year 1751, two years after the settlement of Halifax, with the exception of a few years. These records have been kept with more or less accuracy and detail up to the time of the appointment of the first Master

of the Rolls, and subsequently by the officers of the Court until its abolition. The papers and documents embodying the proceedings and decrees in the various suits are also to be found carefully filed, numbered, and indexed.

From the pages of the old book I have been able to gather much interesting and useful information. It is indorsed as follows:

"CHANCERY.

The old book and only one formerly kept in that Court."

On the inside of the first cover James Burrow, Registrar of the Court, on the 14th February, 1774, made this note:

"From the records and papers put into my possession as Registrar of the Court of Chancery in this Province, I have selected all the minutes I could find in each cause, and have accordingly put them together into this book from folio 43, it being brought up no further, agreeably to their dates, in order to make it as complete as the materials would allow—also formed an index, by which the contents are at one view seen." He then adds: "This and a parchment covered book (which contained fair copies of the articles inserted in this from folio 1 to folio 14, and seemed to have been designed to be continued), were all the books belonging to this Court that I received."

Owing to the care and accuracy of Mr. Burrow, we are thus assured that we have practically a record of all proceedings in Chancery from the institution of the Court.

It is evident from this record that the Governor sat as Chancellor, assisted by members of the Council. The process issuing out of the Court was signed by the Chancellor and the Secretary, as he was then called, William Cotterel, who was therefore the first Registrar of the Chancery Court. From a note in the Nova Scotia archives it appears that he was the first Provost Marshal of the Province, and was succeeded in the office by Captain Foy. He was appointed a member of the Council 23rd October, 1752, and was at that time acting Provincial Secretary. That the Governor aided by the Council at first composed the Court of Chancery, is shewn

by the record of the first case actually heard—the case of Johannes Bernett, complainant, against Joseph Jones, defendant. This was a bill filed for relief from a contract of purchase on 18th day of March, 1751. After the defendant had made full answer, an interlocutory injunction was granted restraining the defendant in certain proceedings he had before commenced against the complainant in the Common Law Court, and on the 5th December, 1751, the cause was heard. The final decree recites as follows: "This cause coming to be heard before His Excellency Edward Cornwallis, Esquire, Captain-General and Governor in Chief in and over the Province of Nova Scotia, and the members of His Majesty's Council for the said Province, sitting by Royal authority as a Court of Chancery, in the presence of the attorneys on both sides." And the decree concludes: "And it is therefore on this said present sixth day of December in the year aforesaid, by His Excellency and the said High and Honourable Court, and the power and authority thereof, ordered, adjudged, and decreed, that this decree, and all the matters and things therein contained, do stand absolutely ratified and confirmed by the order and authority of this Court, to be observed and performed by all the parties concerned according to the terms and true meaning thereof." The point at issue between the parties to this action was the validity of an agreement verbally made by the complaint with the defendant for the sale of his house and lot. The defendant had gone into possession, and paid part of the purchase money. According to the laws then in force no transfer of title could be made without the sanction of the Governor, which had been refused. The complainant, after notifying the defendant that he was unable to complete the title for want of His Excellency's assent, then conveyed the house and lot to William Hoffman, but the defendant, who had in the meantime placed improvements on it, refused to give up possession, and commenced an action for damages against the complainant in the County Court. On this state of facts the bill was filed, and the Court in their judgment say: "His Excellency and the members of his said Majesty's Council, acting as aforesaid as a Court of Chancery, doth order and decree that the complainant should stand absolutely discharged and free from the agreement aforesaid made between him and the said defendant, and that

the same being made without His Excellency's privity and consent was of no effect, neither was the defendant bound thereby, and that the said deed so executed by him to the said John William Hoffman, and approved and registered as aforesaid, was a perfect and absolute deed and conveyance of said lot, and that the property was absolutely vested in the said John William Hoffman." The decree further directs that the lot be discharged from the attachment placed upon it by the defendant, and that possession thereof be forthwith delivered to Hoffman. The money paid by the defendant on account was directed to be repaid to him within one month, and each party was condemned to pay his own costs. The defendant in his answer took exception to the jurisdiction of the Court, averring that the complainant's remedy, if any, was at common law, which exception, however, appears to have been overruled. Such was the nature and determination of the first suit in equity tried in this Province. The whole pleadings, arguments, motions, and decree are transcribed with great fulness, enabling us to form very correct ideas of the Court's procedure and action. I have given these in some detail for that reason. It would take too much space, and not be of any great advantage, to give particulars of those which followed. There is one, however, of a somewhat interesting character to which I must allude—the suit of the Marquis de Conty and Gravina against William Magee and wife, John Brenton, John Grant, and William Nesbitt, which was commenced on the 10th December, 1753. The proceedings are recorded at great length. The defendants appear to have invoked all sorts of devices to delay the complainant and to impede the progress of the cause. Demurrer was filed, motions made, examiners appointed, evidence taken under interrogatories, references made to the Master, reports thereon, exceptions thereto; but finally the Marquis prevailed and obtained a decree in his favour in 1754. This record goes on to state: "After pronouncing the final decree in this cause as above, the solicitor for the defendants made a motion (which he desired might be recorded) to be allowed an appeal from the sentence of this Court to the High Court of Chancery in England, which being considered by the Court, the same was refused, the Court knowing of no right or authority whatsoever they have to grant an appeal in any case but to His

Majesty in Council. Thereafter the solicitor for the defendants made a second motion to be allowed an appeal to his Majesty in Council. The Court refused the motion, the same being insufficient." I have no information respecting the Marquis de Conty and Gravina, but gather from the papers in the cause that his wife died in Halifax leaving considerable property, which she probably bequeathed to others than her husband, and appointed some of the defendants her executors. They took possession of the assets, and this bill was filed on the ground that the will was void as having been made without her husband's consent. It further appears that they had in their custody his child and would not permit the Marquis even to see him. The Court directed that he be allowed to do so. The final decree was as follows:

"It is therefore this present day, viz., the 13th day of August, 1754, and in the 28th year of His Majesty's reign, by His Honour Charles Lawrence, Esquire, President of His Majesty's Council, and Commander-in-Chief of this Province, and the Honourable the rest of the members of the said Council, sitting as a Court of Chancery of the said Province, and by the authority of this high and honourable Court, ordered, adjudged, and decreed—" showing that at this date the Chancellor decided suits in Chancery with the aid of the Council. Another amusing episode of this trial I cannot forbear relating. On the 19th March, 1754, there was a hearing on some interlocutory matter. The record goes on to say:

"The parties having been fully heard were ordered to withdraw that the Court might consider the argument on both sides, when Mr. Grant, one of the defendants, struck Mr. David Lloyd, one of the plaintiff's solicitors, upon their withdrawing from the Court room, of which Mr. Lloyd immediately complained, and prayed the Court's protection."

The Court immediately decided that Mr. Grant had been guilty of a high contempt of His Majesty's Court, and directed the Marshall to take him into custody, and commit him to prison until the further order of the Court, which was done. The next day Mr. Grant offered a most humble apology for his high offence, and with the consent of Mr. Lloyd he was discharged from prison. All which goes to

show considerable feeling between the parties on the subject-matter of the suit.

There are many other records in this interesting old book to which I should like to refer in detail—a reference to one I will make, as interesting to members of the profession. In the case of Anderson v. Taylor, 14th June, 1756, a bill of foreclosure, I find that the English practice was followed. The decree is "that Taylor, the mortgagor, have leave to redeem the premises within the space of six calendar months, or otherwise, as the complainant is now in possession, that the defendant's right of redemption be foreclosed, and the premises enjoyed by the complainant, his heirs and assigns, as their property." We have adopted a different mode of foreclosure, which has been used for many years, and, for reasons which I shall give later on, the English practice could not have prevailed for any length of time.

(To be continued.)

CHARLES J. TOWNSHEND.

HALIFAX.

EDITORIAL REVIEW.

The Canadian Law Times.

This magazine has now completed its nineteenth year. We believe, from many assurances we have received, that it has been from the first, and continuously, highly esteemed by its readers, who are numerous, not only in Ontario, but in the other Provinces of the Dominion, and even elsewhere. We regret to announce that Mr. E. Douglas Armour, Q.C., who was the founder and has been the able and faithful editor of the *Times* from the beginning, finds it necessary to give up his editorial work, and for the future to devote much of the time and energy which he has hitherto expended for the benefit of the readers of the *Times*, to the service of his clients.

This change—unwelcome to the publishers—has been foreseen by those who have watched Mr. Armour's career at the bar, to be, sooner or later, inevitable.

There will be no radical change in the conduct of the *Times*. We hope to have articles of interest from all our old contributors, and in the Occasional Notes shall continue to publish early *resumés* of important decisions, many of which will not be found elsewhere, being made exclusively for this journal.

An extension or enlargement of the annual Index-Digest is also in contemplation.

The editorial management has been assumed by a barrister who has been for many years assistant or sub-editor, and who is personally well known to the members of the legal profession.

BOOK REVIEW.

THE STATUTES SERIAL WITH DECIDED CASES—TAXES AND THE ASSESSMENT LAW, by H. E. F. Caston, Barrister-at-Law. Toronto: The Carswell Company, Limited, Publishers. 1899. This is the first of a contemplated series of annotated statutes designed to be of practical use to lawyers and others. The volume contains the various enactments relating to assessment and taxes in Ontario and a collection of cases thereon.

THE

CANADIAN LAW TIMES.

FEBRUARY, 1900.

THE CONTRACTS OF RAILWAY COMPANIES LIMITING LIABILITY.

(Concluded.)

THERE is, of course, always the question whether the condition relied upon sufficiently absolves a company from negligence occurring off its own lines, but this is a question of construction, depending always upon the appropriateness of the particular words used. One general canon of construction must never be lost sight off, as it is particularly relied upon, namely, that the Court in cases of doubt will decide in favour of the shipper, and against the person using the condition. This is often referred to, and is dealt with by the late Chief Justice Moss in Fitzgerald v. Grand Trunk R. W. Co. (*d*).

Our next limitation is that (d) the statute does not take away the defence of contributory negligence. Claims for personal injuries, for loss of baggage of which the person retains control, and for injuries to cattle, where the shipper or his servant travels with them, furnish instances in which this rule may apply.

Dealing with claims for personal injuries, it is more difficult to find cases in which special conditions govern the relations of the parties.

(*d*) 4 A. R. at p. 624. See also Waikato v. New Zealand Shipping Co., [1899] 1 Q. B. 56.

The conditions upon a passenger's ordinary ticket are not usually as wide as in the case of contracts for carriage of goods, and it was never thought necessary to limit a carrier's liability towards persons with so much verbosity, because he was not an insurer, but only liable for negligence. The questions which arise in Canada are simply these:—

1. Was the complainant a passenger at all, or was he, though on the train, travelling on a "free pass?" For, if the latter is the case, a contract absolving a railway company from liability even for damages caused by its negligence, will be upheld (*e*).

2. Was the carrier negligent? For, if so, the presence or absence of a condition will not relieve him in the face of the statute.

3. If he was negligent, could the passenger, by the exercise of reasonable care, have averted the injury? If there are conditions limiting liability, the position of the railway company might perhaps be stronger, but could not in any case be weaker because of them. One of the most recent cases upon this subject is that of Quebec Central R. W. Co. v. Lortie (*f*), an appeal from the Quebec Courts. It is not, however, exactly a case in point, for the judgment of the majority of the Court is based upon the fact that there was no negligence on the part of the railway company, and that the injury was entirely due to the passenger's carelessness in jumping from the steps of the car to the ground, when he might by passing through the car have alighted upon the station platform, the train having been so drawn up that the front steps of his car led down to the platform, while the rear steps did not reach it, but were two and one-half feet from the ground. In fact these platform cases, of which there are several, rather disclaim the theory of contributory negligence, and hold that the only negligence is that of the passenger in accepting an apparently dangerous state of affairs, instead of calling upon the railway company to remedy it (*g*), but the existence of the

(*e*) Hall v. North Eastern R. W. Co., L. R. 10 Q. B. 437, and Bicknell v. Grand Trunk R. W. Co., 26 A. R. 431.

(*f*) 22 S. C. R. 336.

(*g*) See Siner v. Great Western R. W. Co,, L. R. 3 Ex. 150, L. R. 4 Ex. 117.

defence of contributory negligence is assumed, as indeed seems most natural, in the case of Rose v. North Eastern R. W. Co. (*h*), in which Chief Justice Cockburn says at p. 251: "Of course if he," the passenger, "is careless in getting out and is thereby injured, it is his own fault:" and in Bridges v. North London R. W. Co. (*i*) Mr. Justice Brett, the late Lord Esher, in his answer to the questions put by the House of Lords, says at p. 232: "The plaintiff can only recover if he satisfies the jury by evidence that the defendants or their servants were guilty of negligence, as described, and that he had been injured thereby, and that he has not been guilty of negligence as described, contributory to the accident."

This case and the others cited by the appellant's counsel in the Lortie case at p. 339 give a full outline of the law governing the alighting from platforms, and they all either assume or affirm the right to set up contributory negligence. It must be always remembered, however, that the English statutes regulating contracts of railway companies apply only to goods, and this should be borne in mind in considering their relevancy to the present discussion; as, however, all these cases take it for granted that owing to negligence, the carrier would be liable unless contributory negligence is proved, it is fair to suppose that that defence would equally apply to cases under the Canadian Acts in which the carrier is prevented from setting up a contract limiting liability due to his negligence.

Railways are common carriers of a passenger's ordinary baggage, or luggage, as it is called in England, and must assume a liability therefor which, if it be lost or injured by negligence, cannot be waived by any contract, however worded; but where a passenger retains a partial control of the baggage, as for instance by taking it into a car with himself, it is open to a railway company to show that in spite of its own negligence the proximate cause of the accident was some negligence of the passenger but for which the damage would never have occurred. The leading authority on this point is Bunch v. Great Western R. W. Co. (*j*), and the relation of the parties

(*h*) 2 Ex. D. 248
(*i*) L. R. 7 H. L. 213.
(*j*) 17 Q. B. D. 215, 13 App. Cas. 31.

cannot be more concisely defined than by quoting a portion of the head-note of the report of the case in the House of Lords, which is as follows:—"A railway company accepting a passenger's luggage to be carried with the passenger, enters into a contract as common carriers subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during the transit to which the act or default of the passenger has been contributory." On the general subject of liability for passengers' baggage, the cases of Bergheim v. Great Eastern R. W. Co. (*k*) and Bate v. Canadian Pacific R. W. Co. (*l*), and an article in 2 Am. and Eng. Railway Cases, N. S., p. 1, where the matter is very fully discussed, may be consulted; but for the purposes of this paper nothing can be usefully added to the quotation just given.

Cases in which a carrier may be absolved from liability for injuries to cattle caused by negligence owing to the contributory negligence of the man in charge might arise where, though there is a delay in reaching their destination, from which the animals suffer, yet the person in charge has not availed himself of the means at hand of feeding and watering his stock during transit. It is the general practice of railway companies to pass a man free when transporting cattle, whose duties are to feed and care for them, and such companies usually require the execution of a special contract. In such a case it is submitted that it would be a perfectly valid defence to an action for damage to the condition of stock, caused by negligent delay, to show that means were at hand of feeding and watering stock which would, if taken advantage of by the drover, have avoided the loss. This rule would appear to follow from a consideration of the cases governing passengers' baggage where a limited control is retained, and the remarks of Sir Henry Strong in his dissenting judgment in Grand Trunk R. W. Co. v. Vogel (*m*) may be properly referred to, while in Farr v. Great Western R. W. Co. (*n*), where the plaintiff did not put a proper label on a car of cattle,

(*k*) 3 C. P. D. 221.
(*l*) 14 O. R. 625, 15 A. R. 388, 18 S. C. R. 697.
(*m*) 11 S. C. R. at p. 632.
(*n*) 35 U. C. R. 534.

and did not accompany it himself as agreed, by reason of which the car went astray, it was held that he was himself to blame, and had personally contributed to his own loss, so that he was not entitled to recover damages for the loss of hogs which had died owing to delay in arriving.

After the decisions in Vogel v. Grand Trunk R. W. Co. and McMillan v. Grand Trunk R. W. Co., it was long a matter of doubt whether a railway company could limit beforehand the amount of damages for which it would be liable upon negligent breach of the contract to carry, but it may be now safely affirmed that

(e) A carrier may limit beforehand the amount of damages that may be recovered even if negligence is shown.

The leading authority on this point is Robertson v. Grand Trunk R. W. Co. (*o*), where the plaintiff shipped a horse for carriage over the defendants' line under a special contract by which he was allowed a reduced rate, and agreed that the defendants "should in no case be responsible for any amount exceeding $100 for each and any horse" so shipped. The horse was killed, and the defendants paid $100 into Court. The jury—with the praiseworthy liberality that distinguishes juries when disbursing the moneys of large corporations—assessed the damages at $5,000; but it was finally held by the Supreme Court of Canada that the agreement which the plaintiff had executed was perfectly valid, and that, although the defendants had been found guilty of negligence, the provision of the Railway Act there and here under discussion did not curtail the right to fix liquidated damages for breach of the statutory duty imposed. This case has been recently applied in an action by the widow of an employee of the Government killed on the Intercolonial railway, where it was held on the 4th April last that while the Crown may limit the amount for which in case of negligence it will be liable, it cannot contract itself out of all liability (*p*). For a curious application of the rule in England, the case of Pratt v. South Eastern R. W. Co. (*q*) may be consulted.

(*o*) 24 O. R. 75, 21 A. R. 204, 24 S. C. R. 611.
(*p*) Grenier v. The Queen, 6 Ex. C. R. 276, 19 Occ. N. 202.
(*q*) [1897] 1 Q. B. 718.

Clause (f) of our suggested exceptions to the statutory rules governing negligence does not assume to encroach upon the provision that a railway company cannot contract itself out of liability for damages brought about by its carelessness. Its sole object is to attempt to mitigate its too rigorous operation by stipulating that certain formalities shall be observed before action is brought. In practice the condition precedent usually prescribed is that notice of the loss or damage complained of shall be given within a certain time after receipt of the goods. This provision is a comparatively old one, dating back to the days when there was no statute circumscribing a company's power to contract itself out of liability. It was discussed in the case of Fitzgerald v. Grand Trunk R. W. Co. (*r*), and according to Sir George Burton it has no application where the goods are not to be delivered at a station upon the contracting company's system (*s*). While this limitation to the rule was probably quite justified by the wording of the particular contract then under consideration, it is submitted that by a term aptly worded the benefit of such a condition might be invoked, no matter by whom the goods were to be finally delivered to the consignee. The more recent case of Lake Erie and Detroit River R. W. Co. v. Sales (*t*), already referred to, which affirms in express terms the right of one railway company to make a contract applicable to carriage of goods partly over another line, would, it seems, assist one in coming to such a conclusion, and Sir Henry Strong in the McMillan case (*u*) arrived at the same result long before the decision in the case previously referred to, although Mr. Justice Gwynne, at p. 572 of the same report, thought that for the purpose of that decision the condition was only applicable to the delivery of goods upon the line of the contracting company's railway.

The McMillan case is also authority in favour of the validity of such a condition, notwithstanding the provisions of the Railway Act now being discussed, as that Act was then in force, and was considered in the arguments and judgment.

(*r*) 29 C. P. 586, 4 A. R. 604, 5 S. C. R. 204.
(*s*) See 4 A. R. at p. 635.
(*t*) 26 S. C. R. 663.
(*u*) 16 S. C. R. at pp. 559 and 560.

The latest judgment upon the point is a Quebec case, Gélinas v. Canadian Pacific R. W. Co. (*v*), decided in 1897, where the validity of such a clause was upheld. It has been held by Sir Thomas Galt in Steele v. Grand Trunk R. W. Co. (*w*) that want of the prescribed notice will be no defence where the defendant has failed to carry and deliver the goods at all, as there the clause relied upon never came into operation. Of course, in all such instances, much depends upon the particular wording of the provision, which must be always carefully scrutinized. A good deal of light will be thrown upon this branch of the subject by the cases of Mason v. Grand Trunk R. W. Co. (*x*) and Moore v. Harris (*y*).

The next and last limitation (*g*) is so important that it is almost worthy of an earlier place in this list of exceptions; but the previous remarks will throw some light upon it, so that its comparatively humble position is not to be altogether regretted. Let us look again at sec. 246, and see if we cannot discover, unassisted, the principle for which certain cases will be subsequently cited as authority. That section provides that (1) all regular trains are to be started and run at regular hours fixed by public notice; and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time offered for transportation at the place of starting, and at the junctions of the railways, and at usual stopping places, etc.

Sub-section 2 says that such passengers and goods shall be taken, etc., on the due payment of the toll, etc., lawfully payable therefor; and sub-section 3, which is the one we have hitherto exclusively considered, adds that every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, etc., if the damage arises from any negligence or omission of the company or its servants. The extracts we have given are, as far as they go, verbally correct, but are somewhat shortened, and therefore not enclosed in quotation marks.

(*v*) Q. R. 11 S. C. 253.
(*w*) 31 C. P. 260.
(*x*) 37 U. C. R. 163.
(*y*) 1 App. Cas. 318.

Let us look closely at them. They govern the conduct of the company in running and using regular trains; they operate in favour of passengers and goods offered for transportation at certain usual stopping-places; but do not include within their scope those persons or goods taken on at any other than the places defined, nor those on whose behalf "due payment of the toll, freight, or fare lawfully payable therefor" has not been made. Those not included in this section may, of course, on proper proof that a right of action is vested in them, recover damages; but there is nothing in the statute to preclude them from agreeing with a railway company that it shall not be liable even for its own negligence or default. In fact to such persons and goods the rule of common law dealt with in the early part of this article still applies, and such cases as Hamilton v. Great Western R. W. Co. (*z*) and Dixon v. Richelieu and Ontario Navigation Co. (*a*) would still be in point. But, as principle, even in the case of interpretation of apparently clear provisions, always increases in importance in the eyes of an English lawyer by deriving its origin from precedent, let us look at a few cases.

In Scarlett v. Great Western R. W. Co. (*b*) Sir Thomas Galt in 1877 decided upon a demurrer that this section does not extend to all cases in which negligence is charged against a railway company, but to cases only of neglect coming within the provisions of those sub-sections, and that therefore it is not prevented from stipulating for a limited liability in other cases.

Two decisions are referred to by that learned Judge which can be usefully considered in trying to ascertain the scope of this section. They are cases in which it was decided that the provisions now dealt with, but then to be found in the Railway Act, 1868, sec. 20, had no application to the Great Western Railway as it was operating under a special Act which did not contain such a term, and therefore it was able to limit its liability as far as the common law already dealt with would allow. This shows that the section did not abrogate the general law, but only encroached upon it to a limited

(*z*) 23 U. C. R. 600.
(*a*) 15 A. R. 647, 18 S. C. R. 704.
(*b*) 41 U. C. R. 211.

extent. The cases referred to are Scott v. Great Western R. W. Co. (*c*) and Allan v. Great Western R. W. Co (*d*). The General Railway Acts are now by express enactment made applicable to all railway companies, but the last mentioned cases furnish an illustration of the contention which it is now desired to emphasize, that the rule at common law is not abolished, but remains intact, except so far as it is by express enactment broken in upon.

The remarks of the late Mr. Justice Patterson in McMillan v. Grand Trunk R. W. Co. (*e*), where he says that these provisions now apply only to railways in Canada, but leave the railway "free to prescribe the terms upon which it will undertake the carriage of goods over other lines than its own," are also in point, and he cites Vogel v. Grand Trunk R. W. Co. (*f*) as authority in support of his view.

Sir Henry Strong, when the McMillan case came before the Supreme Court, is reported as agreeing with this opinion (*g*); and, as his is practically the judgment of the majority of that Court, the law may be taken to be settled by the highest authority in this country. An instance of the application of this rule is to be found in the case of Bate v. Canadian Pacific R. W. Co. (*h*). There the judgments were very conflicting; the point being whether the defendants could limit their liability for an accident which arose owing to the faulty construction of the road-bed. The track was built by the Government and taken over by the defendants; part of an embankment gave way whereby a baggage car was overturned, and the plaintiff's effects were set on fire and burnt. There was a condition indorsed upon a cheap ticket on which the plaintiff was travelling, excluding liability even for negligence, and it was held by a majority of the Divisional Court, Mr. Justice Rose dissenting, that the corresponding section then in force only applied to negligence in the management of the train or handling of goods during their

(*c*) 23 C. P. 182.
(*d*) 33 U. C. R. 483.
(*e*) 15 A. R. at p. 18.
(*f*) 2 O. R. 197, 10 O. R. 162, 11 S. C. R. 612.
(*g*) 16 S. C. R. p. 551.
(*h*) 14 O. R. 624, 15 A. R. 388, 18 S. C. R. 697.

transport, or at the point of receipt and delivery, and not to a defective construction of the road-bed, and therefore the defendants could avail themselves of the condition, which was one they were competent to make. This decision was affirmed by the Court of Appeal in 15 A. R. 388, on a different ground, and was reversed by the Supreme Court, 18 S. C. R. 697, on a question of fact; but, so far as reported, there is not a word of dissent from the position taken by the majority of the Divisional Court, so that, read with the decisions previously referred to, it is reasonably safe to assume that the law is as stated in the cases cited. A very recent application of the rule is to be found in the case of Bicknell v. Grand Trunk R. W. Co. (*i*), already mentioned, where a drover travelling on a free pass issued to him on the condition that the railway company should be free from all liability, was precluded from recovering damages for injuries received owing to negligence. He was not a "passenger" within the meaning of sec. 246, and therefore could not rely upon the restrictions it placed upon the power of railway companies to contract.

One important point arising under this proposition is whether there is anything in the Railway Acts which would interfere with a company stipulating that it shall not be liable even for negligence when it has ceased to be a carrier of goods, and holds them only as warehouseman.

An examination of the wording of sec. 246 would at once lead to that conclusion, as that provision only applies to certain operations of the railway, and we have seen that, except so far as they are expressly prevented from freeing themselves from liability for negligence, the right to do so remains. The point, however, has been singularly barren of authority in Ontario, but it has been expressly decided in the North-West Territories, in Walters v. Canadian Pacific R. W. Co. (*j*), where Mr. Justice Wetmore, speaking for the Court, decided that a clause in a shipping contract that goods should remain at the owner's risk after arrival at their destination freed the defendant railway company from all

(*i*) 26 A. R. 431.
(*j*) 1 N. W. T. Reps. 17.

liability for them, even though they had been destroyed by a fire while in its warehouse, which fire a jury had found was caused by the negligence of the defendants. The case is useful also for the learned Judge's analysis of the wording of the section we are considering, and, apart from its merits as an apparently sound judicial opinion, the view there taken seems most reasonable, for the relation of warehouseman is one which no railway usually assumes voluntarily, but, on the contrary, it is generally forced upon it by the delay of the consignee in taking delivery.

We are now brought to the consideration of the last point to be dealt with here, namely, the important question of how far a railway company can by invoking other clauses of the Railway Act, or its charter, or by an interpretation of the clause we are considering, obtain a modification of the strict rule that it cannot, by any notice, condition, or declaration, obtain a release from damages arising from its negligence or that of its servants.

The English statute is so worded that it is open to the Courts to hold that such a contract is under certain circumstances just and reasonable, and consequently valid, though it may be proved that the company is negligent (*k*). This rule is eminently just, because, as has been pointed out by some of the Judges in the Vogel case and Cobban v. Canadian Pacific R. W. Co. (*l*), there are often instances where it is to the advantage of the shipper that he should have his goods carried, though owing to their frailty, perishable nature, or value, a railway company might hesitate to undertake the responsibility, unless the shipper took the risk. It has however been held in the cases cited that the provision of the statute is rigid, permitting of no relaxation, no matter how fair it might be to exempt the carrier, or how clearly it might be proved that the shipper was aware of and undertook the risk which he has contracted to assume. He might even be, and often is, paid to assume such risk, by receiving a much cheaper rate, and the goods might be peculiarly liable to injury owing to their nature,

(*k*) See Brown v. Manchester, etc., R. W. Co., 8 App. Cas. 703, and McCarthy v. Great Western R. W. Co., 12 App. Cas. 218.

(*l*) 26 O. R. 732, 23 A. R. 115.

and yet, though the consideration was duly received, and the contract executed with due formality and perfect knowledge, nevertheless upon a loss occurring he would be entitled to repudiate his contract and recover damages as though he had paid the full tariff rate. There has been considerable conflict of judicial opinion, and Sir Henry Strong, Sir George Burton, and the late Mr. Justice Patterson have all expressly dissented from such a view; but the majority of Judges have been unable to find in the statutes any opportunity of giving relief, though two at least of that majority, Sir John Hagarty and Mr. Justice Osler in the Vogel case, have referred to the difficult and unjust position that a railway company may possibly be placed in. The result is that until there is some decision of a final court of appeal, or some legislative amelioration is provided, it must be assumed to be law that parties, though sui juris and quite at arms' length, and though a distinct advantage is given and received, cannot enter into a contract relieving one of them from the consequence of negligence, however venial, however they may have desired to do so, nor how solemnly or clearly they may have expressed such a desire. It is an anomaly, and oftentimes creates a distinct hardship; but it appears to be "good law."

Since the above words were written, judgment has been given by the Supreme Court of Canada in Grenier v. The Queen (*m*). Some remarks in the judgment of Sir Henry Strong throw much doubt upon the Vogel case, relied upon in Cobban v. Canadian Pacific R. W. Co., and from the nature of those remarks it may be hoped that at some early date in the future the present stringent rule forbidding any attempt on the part of shippers or carriers to exempt a railway company from liability for negligence, may in a proper case be modified.

SHIRLEY DENISON.

TORONTO.

(*m*) 19 Occ. N. 378.

HISTORY OF THE COURT OF CHANCERY IN NOVA SCOTIA.

(Continued.)

The jurisdiction of the Court of Chancery, as I have already shown, was at first exercised by the Governor with his Council sitting as a Court, but the constitution of the Court was changed. The exact time I have not been able to fix, owing to the omission of the Registrar of the names of those present. But on the 13th May, 1767, from an entry of that date it is plain that the Chancellor presided alone, assisted by Masters in Chancery, who were lawyers. The entry is as follows:

BETWEEN,

WILLIAM BUTLER, *Complainant,*

AND

ROBERT CAMPBELL, *Defendant.*

LORD WILLIAM CAMPBELL, *Chancellor.*

JOHN COLLIER,
CHAS. MORRIS,
RICHARD BULKELEY, } *Masters.*

A hearing took place, and decree was made. That this continued to be the constitution of the Court from 1767 until 1825, is very clearly shewn by the Chancery Minute Book B. commencing in 1773, and kept by Mr. James Burrow, the Registrar, ending in December, 1782, and by the succeeding books of record.

Mr. Burrow appears to have been an excellent and careful officer. He was appointed Registrar and Clerk 29th May, 1773, by Lord William Campbell, and subsequently re-appointed by Francis Legge, Esquire, then Governor, 16th August, 1774.

He has in a memorandum affixed to Minute Book B. furnished us with a complete account of the Chancery records at that date, which is as follows:

1. Book kept by the former Registrar.

Books in Chancery opened by Mr. Burrow, now in use:

No. 1. Registrar's Minute Book.
2. Record of all papers filed.
3. General Writ Book.
4. Order Book.
5. Deposit Book.
6. Copy of all receipts for money deposited.
7. Copy of all receipts for money returned.
8. Book of Decrees.
9. Table of Fees.
10. Distribution Book of Chancery Heirs.
11. Receipt Book for money paid by the Registrar to the officers in Chancery.
12. Receipt Book for delivery of all papers and records when under consideration of Masters.
13. Record of all officers in Chancery.
14. Copies of Commissions by which officers are made or admitted in Chancery.

22 MARCH, 1777.

In Book A., which is the Chancery record of office of the Court, and their commissions, and when appointed, we find the following names and officers:—

His Excellency Francis Legge, Esquire, Chancellor.
Charles Morris, Esq., Master.
Richard Bulkeley, Esq., Master.
James Burrow, Esq., Registrar.
John Slayter, Clerk to the Registrar, and afterwards appointed Deputy Registrar.
Richard Gibbons, Esq., Solicitor.
James Monk, Esq., Solicitor.
Daniel Wood, Esq., Solicitor.
W. F. Eaton, Provost Marshall, afterwards Sergeant-at-Arms to the Court.
A Crier and Messenger, name not given.

In another book entitled the Registrar's Minute Book, which is Book B., he has made the following valuable historical note:

"Province of Nova Scotia, Court of Chancery, Registrar's Minute Book, regularly entered from the hearings of every

cause, and the proceedings of this Court, beginning with the 20th October, 1773, and ending with the . . . (a blank not filled). In a note he says: "The first business I acted in Chancery after my appointment of Registrar arose soon after the arrival of His Excellency Francis Legge, Esq.—" Then follow entries in the various causes and the doings of the Court therein from the date above mentioned until 21st December, 1782. The first entry, 20th October, 1773, is in the cause of Malachy Salter v. Gresham Tufts. In this cause the Chancellor ordered the parties and their counsel to attend before him at the Governor's house. Then follows the record of the sitting of the Court:

AT THE GOVERNOR'S HOUSE, 12 O'CLOCK NOON.

MONDAY, NOV. 1, 1773.

Present:

HIS EXCELLENCY THE CHANCELLOR.

MR. BULKELEY AS MASTER IN CHANCERY.

THE REGISTRAR.

The parties attending with their counsel, viz., Mr. Gibbons, for the complainant, and Mr. Wood, for the defendant. The petition of Thomas Bridge as attorney to the complaint was read, and the Court considering the same observed there appeared to be no affidavit from the principal himself to support the matter of fact stated in the petition on which he founded the prayer, and as such affidavit was indispensably necessary for proceedings of this nature in Chancery, the parties were directed to attend at ten o'clock to-morrow, and the Chancellor would then proceed further, upon which the Court finished for this day.

At ten o'clock the next morning the Court opened at Governor's House, but the parties and their counsel were not there, as appears by the following note: "The Court present as yesterday, but the parties not appearing till near eleven were directed by the Chancellor always in future to be punctual to the hour ordered, for he would be exact himself, and expected the same from them." The Court then proceeded to the hearing, of which full details are given, and the Chancellor then gave his decision: "The Court therefore considering the whole matter, and paying due attention to the pleadings and allegations of each party; and those on the part of

the complainant, supported by the affidavit of Thomas Bridge, not appearing strong enough to continue the injunction, doth order that the same be dissolved, and that the defendant be at liberty to take such execution or executions on the judgment so obtained as he shall think fit." From the fact that one Master only was present on the hearing of this case, it is evident they were no necessary part of the Court. I have, however, gone carefully through the record contained in this book, and find that as a rule the same two Masters, Richard Bulkeley and Charles Morris, were always present assisting the Chancellor at the hearings. Later on different Masters performed the same office. On some occasions I find the common law Judges were called in and sat with the Chancellor, no doubt advising him on the more intricate questions coming up for decision. But in pursuing my investigations I have been surprised to find that, contrary to the common impression, there was a Master of the Rolls who sat with the Chancellor prior to 1825. The first record of the existence of such an officer is to be found in the Minute Book of the Court of Chancery commencing 31st March, 1789. The following note is on the first page:

"First Court of Chancery held in which J. Gautier acted as Clerk or Deputy Registrar." Then follows:

"Court of Chancery.

1789.

March 30. Present—The Chancellor,
Master of the Rolls,
Master in Chancery."

Then names are given: Governor Parr,
H. R. Bulkeley,
F. Hutchinson.

"Court opened in Governor's House. Six causes were set down for hearing, but the Court adjourned to 4th February, 1790, when this record is made. A desultory conversation took place. Much was said of former causes, and of the above, but the gentlemen of the Bar not being sufficiently prepared, the Court adjourned to the 11th inst." Following the record we find that at the ensuing seven sessions of the Court is was similarly constituted, the Master of the Rolls always being present. In the next eleven sessions of the Court we

find, in addition to those already mentioned, the Chief Justice, Sir Andrew Strange, sitting with them. The five following sessions were presided over by the Chancellor, the Master of the Rolls, and Master in Chancery. On the 22nd January, 1793, the Court was held in the Court House, and then were present in addition to the Chancellor, Master of the Rolls, and Master, the Chief Justice and Judge Brenton. The Registrar notes that the Chancellor was assisted by these two common law Judges. These same Judges, or one of them, continued to attend the sessions of the Court from this time —not in all cases, but apparently in the majority of them. We are therefore quite safe in drawing the conclusion that from the inception of the Chancery Court to the appointment of Mr. Robie by Royal commission, the proceedings were presided over by the Chancellor, at first with the Council as a component part of the Court, and some ten or twelve years later by Masters in Chancery, and one or more of the common law Judges.

I find the following memorandum made in Book Chancery No. 1, by James Gautier, Clerk, which should be preserved as showing the condition of Chancery records at that date:

"Memorandum — Halifax, Nova Scotia. On the 27th May 1792, the Honourable Mr. Richard Bulkeley, Master of the Rolls in Chancery, deposited or gave me in charge for the first time the following books relating to Chancery, which I had never seen before, although I had acted as Registrar or Clerk from the above printed period (25th January, 1788), viz., Chancery box in the secretary's office—a parchment book —No. 1, a marble covered book—No. 2—do. 3, do. 4 (5, 6, and 7 wanting), do. 8 (9 wanting), do. 10 and 11 in one book, do. 12 and do. 13 and 14 in one book. Every cause in Chancery is now numbered from No. 1 and so on, bearing reference to then books of Chancery No. 1 and 2. From the year 1775, in fact, but more so from 1777 and 1778, the whole record of the proceedings in Chancery seems to have dropped, and most of the books mentioned in the first sentence of this memorandum from No. 1 to 14 were exclusive of that, but little wrote in. For further particulars see Chancery book, No. 2."

I have already mentioned my surprise at finding the title "Master of the Rolls" given in the Chancery records prior to 1825, it being beyond doubt that no such Judge with a Royal commission had up to that time been appointed. The Master of the Rolls is invested with the same judicial power and authority possessed by the Master of the Rolls in England, and as the appointment emanates from the Crown, the office being held under Royal commission, such a title conferred on an officer of the Court not invested with judicial authority was a misnomer—a misconception of the nature of the office. The explanation seems to be that the person called "Master of the Rolls" in these entries was simply the first Clerk, or senior Master in Chancery, but had no judicial authority. The fact that he is never recorded as presiding in Court alone, but always with the Chancellor, brings out clearly his true position. Afterwards when the Master of the Rolls was appointed by mandamus from the Sovereign, he always presided in the Court of Chancery as the sole Judge, and from his orders and decrees there was an appeal to the Governor as Chancellor. On the hearing of such appeals the Chancellor generally, if not always, called in one or more of the common law Judges as his assessors.

With these records before us we can at this day form a very fair conception of the old Court of Chancery presided over by our Governors as Chancellors. We further glean from them that the sessions of the Court were at first held in the Governor's house, then in the council chamber, and finally in the Supreme Court room in the Province building, now occupied by the legislative library. Masters were appointed. There was a Registrar and Deputy Registrar, Sergeant-at-Arms, and crier or messenger, and lastly solicitors duly enrolled and entitled to practise in the Court. It would appear from an entry in one of the Chancery books that the barristers and solicitors had not been always in the habit of attending the sittings of the Court in proper costume. A special order was made in the time of Governor Legge that in future all gentlemen practising before the Chancellor must come properly robed.

(To be continued.)

HALIFAX. CHARLES J. TOWNSHEND.

EDITORIAL REVIEW.

Badgering Counsel.

The practice of Judges—much commented on recently—of assailing counsel with remarks and questions and interrupting the argument by giving their own views on the subject in hand, or other subjects, connected or unconnected with it, is defended by explaining that it is intended to assist in getting at the marrow of the case, and not, though it sometimes looks like it, to convince counsel that they are wrong or know nothing about the case, or to put them down or stop their arguments. It is related that one day a barrister moving to continue an injunction had a very unpleasant quarter of an hour with the Court, being constantly interrupted and, as it seemed to him, opposed by the Judge on the bench. After having manfully struggled through what he had to say, he added, "I have presented my client's case as well as I can, but I see your Lordship is against me." "I am not against you, Mr. ———. On the contrary, I think you have made a very strong case. I will hear the other side." Injunction continued till the trial!

Security for Costs—Ordinary Residence.

The case of Denier v. Marks, 18 P. R. 465, to which we referred in volume 19, at p. 235, has been overruled by the recent decision of the Court of Appeal in Allcroft v. Morrison, 20 Occ. N.31. By Rule 1198 (*b*) security for costs may be ordered "where the plaintiff is ordinarily resident out of Ontario, though he is temporarily resident within Ontario." Mr. Justice Osler said that "actual residence abroad is still what prima facie entitles the defendant to security, and the plaintiff cannot answer the application by shewing that he has practically no fixed residence at all. . . . It by no means follows that because under clause (*b*) a plaintiff may be ordered to give security even when

resident within Ontario, he can, when actually resident out of Ontario, only be ordered to give it if his ordinary place of residence is not within Ontario. On the contrary, it appears to me that in that case, i.e., when resident out of Ontario, the onus is cast upon him to shew that his ordinary place of residence is within Ontario, and that his absence is of a merely temporary character."

A Fin De Siecle Question.

The following remarks from "Case and Comment" for December, 1899, are so exceedingly neat that no apology is made for reproducing them:—

"The people who contend that January 1, 1900, is the beginning of the twentieth century seem bound to prove the proverb that there are two sides to every question. Incidentally they are furnishing the rest of the world much amusement. The naked proposition that ninety-nine years make one century is not very attractive; but the theory that 1,899 years make nineteen centuries seems to be quite fascinating. It is amusing to see people of trained intellect struggling to establish such a proposition. Their delusion is, of course, due to the change in dates at the new year, by which the century is expressed as "1900," instead of "1800." We may well wonder if these people would also contend that the first cent added to $1,899 would be the beginning of the twentieth hundred dollars, instead of the beginning of the last dollar of the nineteenth hundred. To bolster up the patent absurdity of contending that less than one hundred years can make a century, there has been evolved an equally absurd contention that the first year of the first century was not reckoned, but was designated by naught. Of course, no one can pretend to have any proof that such a reckoning of time was actually made, and, unless it can be shown that some sane human being has ever reckoned years, dollars, or something else in that way, this theory may be accepted as an unwitting contribution by sober people to the humours of the time."

Reports of Local Law Associations.

The reports of the County of York and Hamilton Law Associations which are published in this number are full of interest to lawyers. That of the York Association, containing the resolutions passed at the meeting held last June of delegates from the county library associations throughout the Province, and an account of the action taken thereon, as well as an important suggestion of necessary changes in the statute and Rules governing appeals to the Court of Appeal for Ontario, is of more than usual moment.

BOOK REVIEWS.

The Law of Animals.—A Treatise on Property in Animals, Wild and Domestic, and the Rights and Responsibilities Arising therefrom, by John H. Ingham, of the Philadelphia Bar. Philadelphia: T. & J. W. Johnson & Co. Toronto: The Carswell Company, Limited. 1900.

After a little consideration, it is easy to agree in the author's view that there is natural cause for wonder why a text book on this important subject has not appeared earlier. The powers of consciousness, volition, and reproduction, and the liability to suffering and death, form the basis of an elaborate system of rights and responsibilities which may be termed "the law of animals," and which, where it differs in regards to those rights and responsibilities from the general law of personal property, is certainly deserving of at least one book to itself. Nor is it surprising that Mr. Ingham has been able to make a readable, nay an absorbingly interesting, book out of the materials which he has collected, as he says, from more or less concealed places in statutes, reports, digests, and text-books. For, although we have not hitherto allowed ourselves to associate such everyday matters as the sale and mortgage of domestic animals,—with the usual features of warranty and breach of warranty,—the liability for animals killed on the highway, the impounding of animals, and the liability of carriers of animals, with the more recondite subjects of the property in wild animals and their progeny, the taxation of animals, estrays, vicious and ferocious animals, the lien of agisters and trainers, and the game laws—yet the grouping of all these subjects and many others in one volume, has this fascination for the reader, that it turns his thoughts into new grooves, and assists him to grasp the idea that if the law on all these divers matters differs from that governing inanimate personal property, it is because of the before-mentioned powers and liabilities of animals.

The whole subject is conveniently, if not scientifically, divided by the author into seven titles:—

I. Property in Animals.

II. Transfer of Property.

III. Rights of Owners of Animals.

IV. Liabilities of Owners of Animals.

V. Bailment and Carriage.

VI. Cruelty—Game Laws.

VII. Injuries to Animals by Railways.

The first title is divided into two chapters, one dealing with wild animals, and the other with domestic. Among the former we find pigeons, partridges, swans, oysters, bees, and cats. With reference to cats it is interesting to note that the only case cited for the proposition that a person may have a property in a cat and that an action will lie to recover damages for killing it, is a decision of an English County Court Judge reported in a Canadian legal publication. (*a*). Of wild swans, nor of their young, larceny cannot be committed. Domestic cygnets have this peculiarity (chapter 2), that they make an exception to the rule "that the brood belongs to the owner of the mother." The reason of that rule is not only that the sire is frequently unknown, but that the dam during pregnancy is less useful and more expensive to the owner, so that he ought to be the gainer by her brood. The exception is founded on The Case of Swans (*b*): "And the law thereof is founded on a reason of nature; for the cock swan is an emblem or representation of an affectionate and true husband to his wife above all other fowls; for the cock swan holdeth himself to one female only, and for this cause nature has conferred on him a gift beyond all others; that is, to die so joyfully that he sings sweetly when he dies; upon which the poet saith:

> Dulcia defecta modulatur carmina lingua,
> Cantator, cygnus, funeris ipse suit, etc.

And therefore this case of the swan doth differ from the case of kine or other brute beasts."

Under the second title there is an interesting chapter on Estrays. Pursuant to statutory enactments the property in animals is transferred by the act of the animal itself, so

(*a*) Whittingham v. Ideson, 8 U. C. L. J. 14.
(*b*) 7 Rep. 17.

to speak, or a third person, *i.e.*, involuntarily so far as the owner is concerned. The ordinary definition of an "estray" is a wandering beast whose owner is unknown at the time to the person who takes it up, but in Texas the word has a wider significance; in Pennsylvania it has been held to include a stolen horse abandoned by a thief, but not so in New Jersey.

A great deal of industry is displayed by the author in the collection of Canadian cases. Ontario in particular may pride itself on her large contribution to the volume of case-law relating to animals. Under title IV., in the chapter about vicious and ferocious animals, Shaw v. McCreary (*c*) comes in for a good deal of notice. It certainly "went a long way" in legal slang. A bear belonging to one of the defendants escaped from the premises, the separate property of the wife, the other defendant, where it had been confined by him without her objecting thereto, and it was held that, as she had a legal right to have it removed and had not done so, she was liable for an injury caused to the plaintiff. Nor has the author forgotten, when dealing under title III. with injuries to animals on highways, to summarize the recent case of Zumstein v. Shrumm (*d*), where it was held that the owner of a turkey-cock which without negligence strays upon the highway, contrary to a by-law of the municipality, is not liable for damages resulting from a horse's fright at the bird "acting as turkey-cocks usually do." In the same chapter a number of Ontario cases are cited in explaining the principle upon which municipalities are liable for non-repair of highways causing injuries to horses, including the recent Foley v. East Flamborough (*e*), and Atkinson v. Chatham (*f*).

Again, under the seventh title, in the chapter relating to liability under the statutes regulating fences for injuries to animals by railways, we have a summary of the English and Canadian law taken from an article by Mr. R. M. Macdonald in 15 Canadian Law Times, p. 149.

(*c*) 19 O. R. 39.
(*d*) 22 A. R. 263.
(*e*) 29 O. R. 139.
(*f*) 29 O. R. 518; 19 Occ. N. 382.

Perhaps the best and most instructive chapter in the book is that under title VI. upon cruelty and malicious mischief.

For the curious the author gives a reference to certain magazine articles upon "Prosecutions against Animals," "Legal Entomology," "Animal Defamation," etc.

The perusal of such a book as this affords profit, of more kinds than one. The author concludes his preface, in these words: "If the technical text-book writer might hope to encroach somewhat on the province of the poet and the naturalist, and awake in his readers a deeper interest in our rights and responsibilities with regard to the great world of our dumb, though not silent, fellow-beings, and their correlative right to proper protection and kindness at our hands, such an outcome of the time and labour spent on the present work would be, in itself, no mean reward."

It is more difficult to judge of the value of such a book as this viewed as a standard work of reference; time will no doubt disclose its demerits as well as its merits; but, from such tests as can readily be applied, there is reason to believe that the presentation of the subject is not only accurate but exhaustive. The typographical work is unusually good.

Limitations of Actions Against Trustees and Relief from Liability for Technical Breaches of Trust. by Francis A. Anglin, B.A., of Osgoode Hall, Barrister-at-Law. Toronto: The Canada Law Book Company.

This is a concise treatise upon the position of trustees as affected by the 51 & 52 Vict. cap. 59, sec. 8 (Imp.); R. S. O. 1897 cap. 129, sec. 32; 52 Vict. cap. 18, sec. 17 (N.S.); and by 59 & 60 Vict. cap. 35, sec. 3 (Imp.); 62 Vict. cap. 15, sec. 1 (O.); and 61 Vict. cap. 26 (N.B.); with an appendix of statutes, copious references, and a very full index.

Mr. Anglin has manifested great industry in the collection of cases, and has presented his subject in a very clear-cut and attractive way, which makes it easy either to read the book for general information or to consult it as a work of reference, for which it seems to be fully adequate.

HAMILTON LAW ASSOCIATION REPORT, 1899.

Seventy-one members have paid their subscription for the past year.

The treasurer's report duly audited is submitted herewith, giving a detailed statement of receipts and expenditures in the form required by the Law Society. The balance on the loan from the Law Society has been paid, and the association is now free from debt to the Law Society.

The number of bound volumes in the library—exclusive of Gazettes and sessional papers, is 3,456, of which 150 were added during the year as follows: text books and miscellaneous, 52 volumes; reports, digests, and periodicals, 82 volumes; statutes, 16 volumes.

The following periodicals are received namely:—The Law Times and Reports, the Solicitors' Journal and Weekly Reporter, the Times Law Reports, the Law Quarterly Review, the Law Journal Reports, the Canada Law Journal, the Canadian Law Times, the Albany Law Journal, the Green Bag, the Canadian Gazette.

The more important additions to the library during the year have been the Digest of English Case Law, the American and English Enclycopædia of Law, and a generous gift from Mr. Christopher Robinson, Q.C., of 34 volumes of English reports and text-books, of special value as having belonged to his late father, Sir John Beverley Robinson, Chief Justice of Upper Canada.

Early in the year was issued the new catalogue, to a copy of which each member is entitled.

A "card index" of periodicals is also kept for reference.

The trustees have endeavoured, so far as the funds at their disposal would permit, to keep the library up to date in every particular.

Among other sets of books which they desire to complete, are the Canada and Ontario Gazettes, of which some numbers are still required.

The attention of the trustees has been called to the fact that the library is made use of by practitioners not members of the association; the trustees have therefore deemed it advisable to frame a rule restricting the use of the library to members of the association only, the restriction not of course to apply to visiting counsel nor court officials; to this end they have posted up a notice and issued a circular asking the co-operation of all members of the bar in the city and county in carrying out the rule; they trust this action will have the effect of adding new members to the association.

There is insurance on the library to the amount of $6,000.

During the past year death has removed from the ranks of the Hamilton bar four members, Mr. Walter R. Macdonald, one of the oldest practising barristers, and an original member of the association; Mr. P. M. Bankier, for many years a member of the association; Mr. Edward Furlong, who was one of the original members, and who for the past six years up to the time of his death had been a trustee of the association, and had taken a very active interest in its welfare; and Mr. R. W. Witherspoon, for many years a member of the association.

The trustees, while recognizing the assistance of the Ontario Government in the past to the county libraries, would suggest that a change be made in the basis of distribution of the Government grant by fixing a minimum amount for each association, to be increased in proportion to the amount contributed by each member thereof, and this society has urged upon the Attorney-General the adoption of a scheme for the distribution of the grant on the following basis:—

"To the members of all societies of ten members or less in good standing at the rate of $5 per head. To the members of the societies over 10 and up to 20 members in good standing at the rate of $3 per head. To members of societies from 20 to 30 members at the rate of $2 per head. And that to societies having more than 30 members there should be a maximum of $60 or $70."

And there is an assurance that the proposed scheme will have careful attention.

W. T. EVANS,
Secretary.

EDWARD MARTIN,
President.

YORK LAW ASSOCIATION REPORT, 1899.

A well attended meeting of the County of York Law Association was held in the library at the Court House on the 29th January, 1900.

Mr. Wm. Mortimer Clark, Q.C., the retiring president, was in the chair.

The annual report was received and fully discussed.

The following officers were elected for the ensuing year:—President, J. H. Macdonald, Q.C.; Vice-President, J. B. Clarke, Q.C.; Treasurer, Walter Barwick, Q.C.; Curator, Angus MacMurchy; Secretary, Shirley Denison. Board of Trustees—A. W. Anglin, Goodwin Gibson, A. T. Kirkpatrick, R. J. Maclennan, W. E. Middleton, H. M. Mowat, Q.C., and D. W. Saunders.

The meeting directed the trustees to arrange to procure a portrait of Mr. Walter Barwick, who has been for many years active in the interests of the association, and to have it hung in the library.

A vote of thanks was passed to Mr. Wm. Mortimer Clark, Q.C., the retiring president, and the meeting then adjourned.

There are at present 306 members of the association, of whom 27 have not paid their fees for the year. As was pointed out in the annual report for 1898, this number is considerably less than the number of practitioners who at the date of previous annual meetings had been reported as members of the association, but the apparent decrease was due to the fact that the names of many former members who had not formally resigned but had not paid their fees and had practically ceased to belong to the association, had been dropped from its list; so that the present report shows accurately the number of members who actually belong to the association.

The attention of the members is again drawn to the disparity between the number of solicitors practising in the city of Toronto and county of York and the actual membership of this association.

Out of about 598 solicitors residing in Toronto, only 306 are members, while but one solicitor practising in the County of York, outside of Toronto, is on the roll. This matter was referred to in the last annual report, and the profession was then reminded that, in addition to the benefits to be derived from the use of a thoroughly serviceable working library, it has always been the aim of the association to promote and forward useful reforms in legislation and practice, as well as to deal with matters affecting the general welfare of the bar in Ontario.

Much more weight is necessarily given to any representation that may be made on behalf of the association, if it can be shown that it voices the sentiments of a majority of the members of the Toronto bar. The question was fully discussed in the last annual report, but its importance is regarded by the board as sufficient excuse for again referring to it.

The trustees are pleased to be able to report that the library has been maintained in its usual state of efficiency. There are now 3,767 books on the shelves, 156 new volumes ing been added, as follows:—Reports, 31; statutes, 37; text books, 64; periodicals, 18; miscellaneous, 6. Of these additions, 46 were received unbound and bound during the year, and 49 were gifts.

During the year the portrait of Mr. C. H. Ritchie, Q.C., president for the year 1897, was presented to the association by Mr. William Mortimer Clark, Q.C., and is now hung on the walls of the library.

The board has not relaxed its efforts to procure proper accommodation in the new court house, but is yet unable to fix a date at which it may expect to remove. Care has been taken to secure good rooms on the third floor, and, with the assistance of Mr. Eakins, plans and specifications for the furnishings and fittings were prepared and submitted to the city's architect, and as the result of correspondence with the city authorities and of a deputation to the property committee, it is hoped that these specifications will be finally approved at once and the necessary funds furnished by the city, under the provisions of the statute, to ensure the speedy completion of the work. It is important that the removal of

the library should take place at the same time as the occupation of the new court rooms by the Assize Court and County Court Judges, and this fact has been impressed upon the city.

During the year a movement has begun amongst the various county library associations throughout the Province to obtain, by means of joint representations, certain reforms which have been decreed to be important. This movement resulted in a meeting of delegates from various associations, which was held in June last at Osgoode Hall, at which a friendly discussion took place and the following resolutions were passed:—

I.

Moved by Mr. Mikel, of Belleville, seconded by Mr. Steers, of Lindsay: That the Committee of Benchers of the Law Society on County Law Library Associations be requested to take such steps as are necessary to obtain the permission of the Law Society to permit the members of the various County Law Library Associations of the Province to deduct from the annual fee payable to the Law Society the amount of the annual fee actually paid by each member to the respective Associations to the extent of $5.

II.

Moved by Mr. Bennett, of Peterborough, seconded by Mr. Hopkins, of Lindsay: That the Law Society be requested to take steps to procure the Dominion and Ontario Provincial statutes for the profession, and also arrange for the publication of a work on practice from time to time as the needs of the profession require, to be supplied at actual cost.

III.

Moved by Mr. Wood, of Peterborough, seconded by Mr. Morden, of Belleville: That the Law Society be requested to devise a scheme for making the Law School self-sustaining.

IV.

Moved by Mr. Hopkins, of Lindsay, seconded by Mr. McLean, of Guelph: That a meeting of representatives of the County Law Library Associations should be held annually in the latter part of June, and that the secretary correspond with the different associations with this end in view

—and that Mr. Shirley Denison of Toronto and Mr. McLean of Guelph be a committee to advise with and assist the secretary in carrying this out.

Resolutions Numbers I., II., and III. were submitted to the benchers, and the matter was referred to a special committee composed of the chairmen of the seven standing committees of Convocation, and Messrs. Barwick, Shepley, and Strathy. This committee has dealt with the matter at considerable length in a report which was made to the benchers, and as the matter is important and shows a due regard for the wishes of the combined associations, it has been deemed advisable to set forth its purport at some length. After reciting the resolutions, the report proceeds to say that in order to determine how the committee should deal with the matters referred to in them, an examination was made of the financial affairs of the Law Society, and this examination disclosed that during the last five years disbursements have exceeded receipts by about $6,000, and that the receipts under the statute of 57 Vic. cap. 44, providing for the call of solicitors to the bar, realized a sum of about $26,000 in the past, while in the future these receipts will be very trifling.

The publication of the "Century digest" involves an estimated expenditure of $30,000, which would have to be taken from the capital account, and it was feared that no return upon this could be had for several years.

The amount received from interest on investments has also decreased owing to withdrawals of money from capital account and reduction in the rate of interest.

Attention was also drawn to the fact that grants amounting to $23,000 had been made to the county library associations throughout the Province during the last five years, and that the Supreme Court Reports, which are now supplied free to the profession, involved the expenditure during the same period of over $12,000.

In view of these facts, the committee could not recommend any large additional annual expenditure or any loss of income, and therefore felt compelled to report against compliance with request to reduce the annual fee.

As a book on practice had recently been published, and there was a possibility of changes in the practice being at any time made, the committee deemed it unwise for the society to publish a new work which might not be in demand for many years, unless some very radical change was made in the procedure of the Courts, and the committee were not assured that the Society could produce a work at a cost appreciably less than that now paid for the work recently published.

As the Law Society could, by subscribing for a large number of volumes, obtain the Dominion and Ontario statutes for about cost price, the committee recommends that both these statutes should be supplied for $2 a year to any solicitor who pays with his annual fee an additional sum of $2.

The committee finds that the deficiency occasioned by the establishment and carrying on of the Law School is not as great as from a cursory examination might appear on looking at the state of the finances of the society, and considering the fees charged by medical and other technical schools, it is of the opinion that it is time that the fees to students attending the Law School should be increased to $40 per term yearly after September 1st, 1900, and for the two following yearly terms, instead of $25 as at present, and that after September 1st, 1903, the yearly fee should be $50, which it is hoped will have the effect of placing the school on a self-supporting basis.

While not fully complying with the wishes of the united associations, it becomes evident from this that much weight has been given to their representations.

Preparations will be made for holding a bar dinner, as suggested by the fourth resolution, and it is hoped that members of this association will cordially co-operate with the county associations in making this dinner a success. Probably no better method of bringing the members of the bar together in friendly intercourse and discussion could be devised, and it may be confidently expected that, if successfully carried out, it will be the means not only of advancing useful reforms, but of removing local misunderstandings and creating an esprit de corps amongst members of the profession that is at present somewhat lacking.

The board of trustees invite the attention of the members to the present somewhat unsatisfactory condition of appeals to the Court of Appeal. Owing to the recent legislation which limited each party to one appeal to Ontario Courts, it has become the practice to take a large number of cases tried at Assizes or before a Judge sitting in single Court direct to the Court of Appeal, so that in the event of failure there the appellants may have an opportunity to proceed to the Supreme Court, a right which is not interfered with by the statutes referred to. Thus the time of the Court is frequently wasted in deciding matters properly belonging to a Divisional Court, such as appeals from judgments given at the trial refusing a nonsuit and applications for new trials, in which no important question of law is involved, and the arguments of counsel and judgments of the Court are confined to discussions of evidence and questions of fact.

The following table showing the relative number of appeals set down for hearing, and those heard, during the year 1899, will illustrate this point:—

TABLE OF CASES SET DOWN FOR COURT OF APPEAL.

Sittings	Appeals from Single Judges.		Appeals from Divisional Courts.	
1899	No. set down	No. heard	No. set down	No. heard
January	57	16	14	6
March	60	17	12	0
May	64	14	21	16
September	69	26	8	0
November.....	61	25	17	2

From an examination of this table it becomes apparent that not only is the greater part of the time of the Court spent in hearing appeals from Judges sitting in single Court, or at Assizes and non-jury sittings, so that appeals from a Divisional Court are sometimes not heard at all during the

sittings, but also that much more work is imposed upon the Court than it can, at at present constituted, deal with. This undoubtedly proceeds from the dislike which unsuccessful litigants in a Court of first instance have to risking everything upon one appeal to a Divisional Court, while by proceeding direct to the Court of Appeal they have the option of a further appeal to the Supreme Court, if they deem that their interests demand it. The considerations now merely outlined seem to the trustees to be of sufficient importance to require careful investigation with a view to introducing such amendments into the practice as may remedy the evils at present existing, and the board proposes during the present year, subject to the approval of this meeting, to consider amendments which may be submitted to the proper authorities for adoption, and for this purpose will welcome any suggestions that may be made by members.

While suggesting the necessity for changes in the legislation and practice governing appeals to the Court of Appeal, the trustees have pleasure in pointing out the satisfactory changes made in the law affecting County Court appeals, whereby they are now carried to a Divisional Court and there summarily disposed of, instead of being brought by previously expensive stages before the Court of Appeal, and occupying the time of a Court which from its nature should be enabled to devote itself exclsively to matters of greater importance.

THE

CANADIAN LAW TIMES

MARCH, 1900.

LEGAL ETHICS.

MR. JUSTICE ROSE, lecturing to the more advanced students of the Law School at Osgoode Hall on the above subject, divided it into five heads:—

I. The duties of legal men to the public.

II. To their clients.

III. To the Court.

IV. To each other.

V. To themselves.

His main proposition under the first title was that it was more important that the public, as well as the suitors immediately concerned, should have confidence in the administration of justice, than that the particular issue should be determined with perfect accuracy; and he emphasized the duty of the lawyer, whether at the bar or on the bench, to so conduct every cause that the public may feel that a fair trial is had between the parties, so that confidence in the Courts will be established which will lead the public to have recourse to them instead of to personal assertion of rights.

The duties of lawyers to their clients are stated with great force and clearness in the oath of office taken by a barrister: To protect and defend the rights and interests of such of his fellow citizens as may employ him; to conduct all causes faithfully and to the best of his ability; to neglect no man's interest, nor seek to destroy any man's property; not to be guilty of champerty or maintenance; not to refuse causes of

complaint reasonably founded, not to promote suits upon frivolous pretences; not to pervert the law to favour or prejudice any man, but in all things to conduct himself truly and with integrity; in fine, the Queen's interest and his fellow citizens' to uphold and maintain according to the constitution and law of this Province.

A somewhat remarkable document, the report of the Committee on Legal Ethics to the Michigan Bar Association, was frequently quoted by the learned Judge in the course of his remarks. "Nothing," says this report, "has been more potential in creating and pandering to popular prejudice against lawyers as a class, and in withholding from the profession the full measure of public esteem and confidence which belong to the proper discharge of its duties, than the false claim . . . that it is an attorney's duty to do everything to succeed in his client's cause. . . . . No sacrifice or peril, even to the loss of life itself, can absolve from the fearless discharge of the attorney's duty. Nevertheless, it is steadfastly to be borne in mind that this great trust is to be performed within and not without the bounds of the law which creates it."

Upon the question as to the lawyer's belief in the righteousness of his client's cause, the report continues: "An attorney cannot neglect the defence of a person accused of a criminal defence because he knows or believes him guilty. It is his duty by all fair and lawful means to present such defences as the law of the land permits, to the end that no one may be deprived of life or liberty but by due process of law."

Lord Campbell said of Sir Matthew Hale that "he began with the specious but impracticable rule of never pleading save on the right side, which would make the counsel to decide without knowing either facts or law, and would put an end to the administration of justice."

What is the duty of an advocate retained in a bad cause? How far may a lawyer go in advocating the cause of his client? These questions are the subject of a paper by Mr. Showell Rogers in the *Law Quarterly Review* for July, 1899.

Boswell asked Dr. Johnson what he thought of one supporting a cause which he knew to be bad. He got his answer as usual:—"Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your argument to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself may convince the Judge to whom you urge it; and if it does convince him, why, then, sir, your are wrong, and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion."

Apt words by Bramwell, B., to the same effect are to be found in *Johnson* v. *Emerson* (*a*): "A man's rights are to be determined by the Court, not by his attorney or counsel. It is for the want of remembering this that foolish people object to lawyers that they will advocate a cause against their own opinions. A client is entitled to say to his counsel, I want your advocacy, not your judgment; I prefer that of the Court."

Lord Halsbury in a letter to Mr. Showell Rogers characterizes as extravagant and ridiculous the thesis that an advocate is bound to convince himself, by something like an original investigation, that his client is in the right, before he undertakes the duty of acting for him. He says that if an advocate were to reject a story because it seemed improbable, he would be usurping the office of the Judge or jury. Very little experience of Courts of justice would convince any one that improbable stories are very often true notwithstanding their improbability.

On this question as to a lawyer's duty to his client, Lord Brougham said that an advocate should reckon everything subordinate to the interests of his client; but Cockburn, L.C.J., said that an advocate should, indeed, be fearless in

(*a*) L. R. 6 Ex. 367.

carrying out the interests of his client, but with this qualification and restriction "that the arms which he wields are to be the arms of the warrior and not of the assassin—it is his duty to accomplish the interest of his client *per fas* and not *per nefas.*"

Mr. Showell Rogers also draws attention to the canon of legal ethics, not so carefully observed as it should be, that an advocate should not, as such, express his personal opinion of, or his belief in, his client's cause. Mr. Justice Rose's remarks on this are weighty:—"Your duty to your client does not call for any expression of your belief in the justice of his cause. . . . The counsel's opinion may be right or wrong, but it is not evidence. If one counsel may assert his belief, the opposing counsel is put at a disadvantage if he does not state that in his belief his client's cause or defence is just. If one counsel is well known and of high standing, his client would have a decided advantage over his opponent if represented by a younger, weaker, or less well known man."

Among many practical pieces of advice given to the students by the learned Judge, was the following: "Be most scrupulous in drawing up affidavits for your clients to swear to. I regret to say that the belief has prevailed that in many cases affidavits are drawn without careful instructions as to what the client or deponent may truthfully state, but rather to support some position beneficial to the cause the solicitor is appearing for. You are in a measure the keeper of your client's conscience. Be most careful lest you bring upon yourself condemnation for the guilt of moral, if not legal, subornation of perjury."

Passing on to the third division of his subject, the duties of lawyers to the Court, the lecturer referred to the position of solicitors and counsel as officers of the Court and co-workers in ascertaining the rights of the parties on the facts and according to the law, and also counselled courtesy, but not subserviency, to the Court. "Neither truckle nor be truculent," was his advice.

The question dealt with under this head as to whether it is the duty of counsel to point out to the Court matters of

fact or law which seem to be against his contention, is of surpassing interest.

In a recent case counsel for the plaintiff is reported as saying at the opening of his argument: "As the defendant does not appear in opposition to the motion, the plaintiff is bound to call the attention of the Court to certain cases which seem to raise a doubt whether the present action will lie" (*b*).

Mr. Showell Rogers holds it to be the advocate's duty to point out to the Court precedents against himself and wholly undistinguishable which have been overlooked by his opponents. He admits, however, that this is "a counsel of perfection the practical exercise of which, while certain to win the advocate who is thus frank and candid the approbation and favour of the Court, and the grateful surprise of his opponents, is almost equally certain to lose him his client."

A writer in the *Law Notes* (Northport, New York,) for July, 1899, says that if this course is adopted, it is hard to see where a line is to be drawn. "If precedents decisive in favour of an opponent are to be quoted, why not cases making for his view but not decisive?" And he quotes a criminal case in which the convicted appellant was represented by counsel, but the respondent was not, where the Judge said: "I agree that it is unfortunate to a certain extent—although of course we do not suggest that counsel for the appellant would not have brought any authorities before us that he knew of—that we have not had an argument for the respondent in order to ascertain whether there has been any authority on this subject during these fifty years" (*c*).

In *Credits Gerundeuse* v. *Van Weede* (*d*), Pollock, B., said: "Mr. Barnes in moving properly called our attention to a decision in Patorni v. Campbell, which, if effect is to be given to it, is clearly against his application."

But the most instructive case on this branch of the subject is Earl Beauchamp v. The Overseers of Madresfield (*e*),

(*b*) Cole v. Langford, [1898] 2 Q. B. 36.
(*c*) Benford v. Sims, [1898] 2 Q. B. 646.
(*d*) 12 Q. B. D. at p. 175.
(*e*) L. R. 8 C. P. 245.

in which Lord Beauchamp and the Marquis of Salisbury appealed from decisions of revising barristers. The names of the appellants appeared in the lists of persons claiming to vote in respect of freehold houses and lands, but, as it was proved that they were peers of parliament, the revising barrister determined that they were not entitled in law to have their names inserted in the register of voters for elections to the House of Commons. The appeals were heard together in 1872 by the Court of Common Pleas, *coram* Bovill, C.J., Keating, Brett, and Grove, JJ. A. Wills, Q.C., in opening for Lord Beauchamp, said that it was difficult to contend that such a right as his client asserted existed, when every principle of the constitution and all the authorities upon the subject were opposed to it, and the most diligent search had failed to discover a single atom of authority in its favour. And he then went on, at considerable length, to lay before the Court all the authorities he could find on the subject—all against his own contention. Manisty, Q.C., for Lord Salisbury, after the authorities referred to by Mr. Wills, agreed that it would be vain to argue that a peer had a right to vote.

Bovill, C.J., said: "From the course which the learned counsel have taken, and properly taken, on the argument of these cases, it seems hardly necessary for us to do more than pronounce a formal judgment for the respondents, the learned counsel for both the appellants agreeing that their claim to vote is untenable. As, however, the matter has been brought before us for decision, it may be expedient to state our reasons."

Keating, J., after stating his reasons for agreeing, said: "I would merely desire to add an expression of my entire approval of the course pursued by the learned counsel for the appellants; and to say that I have yet to learn that it is otherwise than the duty of counsel to say so when he finds a point not to be arguable. I have always understood it to be the chief function of the bar to assist the Court in coming to a just conclusion."

But Brett J.—"I feel extremely reluctant to give any judgment in this case. The course which has been pursued

by the counsel for the appellants has placed the Court in great difficulty. I must confess I entertained considerable doubt whether the claim set up could be supported; but I thought it right to make some suggestions for the purpose of ventilating the propositions stated by the learned counsel in admitting that they had no case. I quite agree that it is the duty of counsel to assist the Court by referring to authorities which he knows to be against him. But I cannot help thinking that when the counsel has satisfied himself that he has no argument to offer in support of his case, it is his duty at once to say so, and to withdraw altogether. The counsel is master of the argument and of the case in Court, and should at once retire if he finds it wholly unsustainable, unless indeed he has express instructions to the contrary. With the greatest respect for the two learned counsel who have appeared for the appellants in this case, I must confess I do not quite approve of the course which they have taken."

Grove, J., expressed no opinion upon the propriety of the course taken by counsel.

There cannot be said to have been a decision upon the point now under discussion, which was not really in question in that case, but the opinions expressed by three members of the Court are very interesting and were most pertinent to the subject of the lecture. It will be observed that all three agree that it is the duty of counsel to assist the Court by referring to authorities which he knows to be against him.

The duties of lawyers to each other are well set forth in the Michigan document to which reference has already been made. "Clients and not their attorneys are the litigants; and whatever may be the ill-feeling existing between clients, it is unprofessional for attorneys to partake of it in their conduct and demeanour to each other, or to suitors in the case." "In the conduct of litigation and the trial of causes the attorneys should try the merits of the cause, and not try each other." "Personalities should always be avoided, and the utmost courtesy always extended to an honourable opponent." "As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client . . . the attorney must be allowed

to judge. No client has a right to demand that his attorney shall be illiberal in such matters, or that he should do anything therein repugnant to his own sense of honour and propriety; and if such a course is insisted on, the attorney should retire from the cause." "An attorney should not attempt to compromise with the opposite party without notifying his attorney."

Under the last head, the duty of lawyers to themselves, Mr. Justice Rose gave some excellent advice which we shall not repeat in detail. He spoke again of the duty of courtesy as one which a self-respecting man owed to himself, and said that a barrister or solicitor should be in fact as well as in name a gentleman—a man of education, high principles, courtesy, and kindness.

CONFORMITY OF STATEMENT OF CLAIM TO WRIT.

The adoption in Ontario in 1897 of the English Order XX., Rule 4, and a recent decision of the Court of Appeal, have brought up for discussions the old questions whether the statement of claim in an action must strictly conform to the writ of summons, or, if not, what degree of departure, or extension, will be allowed—questions which are in some instances associated with a more important one as to the right to set up a new cause of action as against the Statute of Limitations.

Reference to the few cases which have arisen in Ontario, or Upper Canada, and to some English ones, will show how the law stands at the present time.

The only reported case in this Province before the Common Law Procedure Act appears to be Ketchum v. Rapelje (*a*). The declaration was in debt for an escape of a prisoner arrested on a ca. sa., while the process was for trespass on the case generally. Robinson, C.J., said: "I am of opinion that the declaration must be set aside as irregular, there being no process to warrant it, and nothing being shewn to the contrary. I am asked to allow leave to plaintiff to declare as he has done notwithstanding this variance from the process; but I think I could not properly do so." And he referred to Thompson v. Dicas (*b*), where the writ was in trespass, and the declaration trespass on the case, and the Court set aside the declaration for irregularity, saying that the writ was now the commencement of the action for all purposes.

Sowden v. Sowden (*c*) marked the advance made since the Common Law Procedure Act. The writ was specially indorsed for several money demands, but the declaration made additional claims of a similar kind. Draper, C.J., refused to go to the length of saying that the plaintiff could not declare for any other cause of action than that referred to in the indorsement.

(*a*) 1 C. L. Chamb. 152.
(*b*) (1833), 2 Dowl. 95.
(*c*) (1868), 4 P. R. 276.

In Huggins v. Guelph Barrel Co. (*d*) it was held that the particulars of claim specially indorsed upon the writ of summons do not bind the plaintiff as particulars when he, after appearance, declares on the common counts, but he is bound to furnish particulars when demanded in a proper case—the reason being that in his declaration he may go beyond the indorsement.

The decision in Campbell v. James (*e*) is not precisely upon the subject now under discussion, but has a bearing upon it. The indorsement was for recovery of land and mesne profits; the statement of claim prayed specific performance of a contract by the defendant to buy the land from the plaintiff, and, in the event of that not being decreed, possession. No order had been obtained for leave to join another cause of action with a claim for the recovery of land, as required by the then Rule 116. Inasmuch as the two causes of action could not conveniently be prosecuted separately, leave was given to amend the writ nunc pro tunc (*f*).

Lainchberry v. Dunn (*g*) was decided at a time when liberality in allowing amendments had become the rule, and it was probably on the ground that an amendment of the indorsement of the writ, if applied for, would have been allowed as a matter of course, that it was held not improper to depart from the indorsement of the writ, which was simply for damages for seduction of the plaintiff's daughter, by adding a claim for maintenance of an infant under an agreement entered into by the defendant.

In McNab v. Macdonnell (*h*) the plaintiff's claim as indorsed on the writ appeared to be a personal claim, but in the statement of claim he stated that he sued in a representative capacity. The action was against solicitors for negligence and breach of trust in investing moneys. Held, that it was not necessary to amend the writ.

(*d*) (1879), 8 P. R. 170.

(*e*) (1886), 11 P. R. 347.

(*f*) A somewhat similar case is May v. Drummond (1895), 17 P. R. 21.

(*g*) (1889), 9 Occ. N. 412.

(*h*) (1892), 15 P. R. 14.

In Ross v. Edwards (*i*) a motion was made to stay the action as vexatious, or an abuse of the process of the Court, because the matters in question were adjudicated upon in a previous interpleader issue between same parties. The motion was made immediately after service of writ of summons. Osler, J.A., said (*j*):—"It is by no means clear that this action as it may be presented by the statement of claim . . . is so vexatious or unfounded that it ought at this stage to be summarily stayed. . . . It was premature at this stage to assume that this was the whole scope of the action, even though the plaintiff had so indorsed his claim upon the writ of summons: Willis v. Earl Beauchamp" (*k*).

Hogaboom v. MacCulloch (*l*) is a different kind of case, but it goes further than any previous one. It was decided before the new Rule 244 came into force. Where a writ of summons in an action for a specified cause has been issued and served upon defendants out of the jurisdiction with a statement of claim, pursuant to an order under Rule 271 (now 162), and the defendants have appeared, an order may properly be made allowing the plaintiffs to amend the statement of claim by adding a new claim for an entirely different cause of action, provided that it is a claim in respect of which leave to serve process out of the jurisdiction might have been obtained; but the plaintiffs should, in respect of the Statute of Limitations running against their added claim, be placed in the same position as if their action for the added claim had been brought at the date of the amendment.

In McLean v. McLean (*m*) it was held that a plaintiff cannot set up in his statement of claim matters arising pending the action.

These two last cases were immediately before the introduction into Ontario practice of Rule 244, 1st September, 1897: "Wherever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ."

(*i*) (1892-3), 13 P. R. 523, 15 P. R. 150.
(*j*) 15 P. R. at p. 154.
(*k*) (1886), 11 P. D. 59.
(*l*) (1897), 17 P. R. 377.
(*m*) (1897), 17 P. R. 440.

This is in the exact words of the English Order XX., Rule 4, which was made in 1883, and was declaratory of the practice laid down in Large v. Large (*n*) before it was passed.

A practical limitation of the Rule is, that where there is no appearance by the defendant, the plaintiff cannot enlarge the scope of the claim indorsed on his writ (*o*).

The first reported case under the Ontario Rule is the decision of a Divisional Court in Smythe v. Martin (*p*), where it was held that what was claimed by the pleading was an "extension" of what was claimed by the writ within the meaning of Rule 244. The action was by mortgagee against mortgagor, and the indorsement was for an injunction to restrain waste, while the statement of claim asked, in addition, posssession of the land in respect of which the injunction was sought. The Court pointed out that this was a reasonable addition to the original claim, and distinguished such cases as United Telephone Co. v. Tasker (*q*) and Cave v. Crew (*r*), where the claims sought to be added were distinct and dissimilar.

The latest case is Bugbee v. Clergue (*s*), a decision of the Court of Appeal. The action was commenced by writ issued on the 25th June, 1897. The writ of summons was indorsed only with a claim upon a judgment recovered by the plaintiff against the defendant on the 4th February, 1896, in a foreign Court. The statement of claim was delivered on the 9th December, 1897, and set forth a claim not only upon the judgment already mentioned, but also upon the promissory note made by the defendant and another person upon which the foreign judgment was recovered. To the claim upon the judgment the defendant pleaded that it had been recovered against him irregularly and without process of law; and to the claim upon the note, inter alia, that it was barred by the Statute of Limitations. The note in fact became due on the 4th July, 1891.

(*n*) [1877] W. N. 198.

(*o*) Law v. Philby (1887), 35 W. R. 450; Gee v. Bell (1887), 35 Ch. D. 160.

(*p*) (1898), 18 P. R. 227.

(*q*) (1888), 59 L. T. N. S. 882.

(*r*) (1893), 41 W. R. 359.

(*s*) (1900), 20 Occ. N. 57.

At the trial it was contended by the defendant that the statement of claim should have conformed to the writ of summons, and that the claim upon the note should be struck out; but Armour, C.J., said that, as no such question was raised by the statement of defence, it was too late to raise it at the trial; that the objection, if it were tenable at all, should have been taken by motion to strike the claim upon the promisssory note out of the statement of claim; but such a motion could not have succeeded, for at the time of the delivery of the statement of claim Rule 244 was in force, which provided that the plaintiff might extend his claim without amending the indorsement of the writ; distinguishing Ker v. Wiliamson (*t*), and United Telephone Co. v. Tasker (*u*), and referring to Sowden v. Sowden (*v*), Large v. Large (*w*), and Johnson v. Palmer (*x*).

It was also contended at the trial that even if that part of the claim based upon the promissory note should be allowed to stand, the action must be considered as to that cause of action to have been begun by the delivery of the statement of claim. This question also was not raised by the defence, and the Chief Justice held that it was too late to raise it at the trial, and that it was not a case in which an amendment should be permitted.

The case went to the Court of Appeal, and its judgment on this point was delivered by Mr. Justice Osler on the 16th January, 1900. He said: "The defendant says that the claim upon the note was not indorsed on the writ, and was set up for the first time in the statement of claim, which was not delivered until the 9th December, 1897, and that as regards the note this must be taken to be the date of the commencement of the action. I cannot agree with this contention. It was not the issue tendered by the defendant on the pleadings, and I think the trial Judge was right in holding that the justice of the case did not require that an amendment should be allowed, even if that were the proper method

(*t*) (1886), 30 Sol. J. 238.
(*u*) (1888), 59 L. T. N. S. 852.
(*v*) 4 P. R. 276.
(*w*) [1877] W. N. 188.
(*x*) (1879), 4 C. P. D. 258.

of raising the point. It may be that it could have been taken by motion to set aside the statement of claim for irregularity, but the opportunity for taking that course had long passed by. Lancaster v. Moss (*y*) does not help the defendant. That was an action for slander. The trial judge had, in invitum, given the plaintiff leave to amend the statement of claim by adding claims for other causes of action, such as assault and false imprisonment, then barred by the Statute of Limitations, and wholly unconnected with that originally sued for. The Court held that he ought not to have permitted such an amendment, and dismissed the action (*z*). But that is a very different case from this, where the two causes of action were directly related, and the irregularity, if it were one, was not struck at at the proper time, and the defendant has pleaded over, treating the writ as the commencement of the action as to all the causes of action set forth in the statement of claim."

It will be observed that both here and in England, before the Rule, great liberality was exercised in permitting the statement of claim to go beyond the writ; indeed, the principal effect of the Rule was not to allow a departure, but to set at rest the question whether it was necessary to amend the writ to suit the departure.

Opinions, of course, will differ as to what is an alteration, modification, or extension of a claim, and it is not improbable that we shall see as many cases decided under the Rule in Ontario, as there have been in England.

It seems to be recognized or assumed that to add a new claim or a new cause of action is permitted by the Rule, but the cases point to the necessity for the added claim being directly related to the original.

The proposition that the action should, as against the Statute of Limitations, be deemed to have been begun when

(*y*) (1899), 15 Times L. R. 476.

(*z*) *Cf.* Hogaboom v. MacCulloch, 17 P. R. 377, supra, where an amendment was allowed, but upon terms that the plaintiffs should, in respect of the statute running against their added claim, be placed in the same position as if their action had been brought at the date of the amendment. See also Huthnance v. Township of Raleigh (1897), 17 P. R. 458.

the statement of claim was delivered, if the writ does not make the claim against which the statute is set up, is a fair one; but the answer of the Court of Appeal that the defendant may waive the advantage of that position, by in his pleading treating the writ as the commencement of the action as to all the causes of action set forth in the statement of claim, was quite sufficient for the purposes of the case in hand.

It may be deduced that the proper practice where the statement of claim does not conform to the indorsement of the writ, or goes beyond a reasonable extension of it, is to move to strike out the pleading for irregularity.

HISTORY OF THE COURT OF CHANCERY IN NOVA SCOTIA.

(Continued.)

Let us next turn our attention to the practice and procedure of the Court, and observe how and in what manner its business was carried on. Some particulars of the earliest cases coming before the Court for adjudication have already been given by way of illustration. These, however, by no means cover the whole field of Chancery litigation. We find that defendants were brought into Court by the old process of writs of subpœna regularly issued, tested in the name of the Chancellor, sealed with his private seal, signed by the Registrar, and served by the Provost Marshal, and afterwards by the Sergeant-at-Arms, who was sheriff of the county of Halifax. Bills of complaint, answers, pleadings, and demurrers were duly filed. Motions, references to Masters, interrogatories administered and taken before examiners, orders and decrees made and duly enrolled. Every known subject of equitable jurisdiction, from time to time, seems to have come before the Chancellor for hearing and decision. Briefly to enumerate some of them extracted from the very complete index kept by the Registrar, I find bills to set aside agreements—for injunctions—for injunctions against proceedings at law—for account and relief—for foreclosure—for specific performance—for account and dissolution of partnership—for discovery—for redemption—for contribution among sureties—for dower—for partition—for writs of *ne exeat regno* — for *scire facias* to repeal letters patent — for administration of trusts and estates — for writs of *de lunatico inquirendo*—for writs of *certiorari*—and lastly one application for a writ of *audita querela*, which, on the advice of the Chief Justice, was not granted. The above list of subjects shows that the scope of the business must have been quite extensive, and the subjects such as to demand considerable knowledge of equity proceedings and principles. I have not pretended to investigate the correctness of the Chancellor's decrees, nor would it serve any useful purpose now to do so. Bills for foreclosure, as we should expect, largely

predominate. Many of the modes of procedure then in use have been swept away by the spirit of modern reform. It is only interesting to us now as showing a Court of equity then in the Province adjudicating and proceeding in all matters requiring equitable relief.

I now come to the important inquiry as to the practice and procedure which governed our old Chancery Court. Our early Governors being laymen, it occurred to me that their methods of procedure would be of the simplest character, untrammelled with the fixed equity rules and practice of the mother country. This, however, was not the case. Fortunately, we have in one of the Chancery books of record most complete information on this point. The practice, generally speaking, was in conformity with that in vogue in all equity courts at that period. But the particular code of procedure and general rules contained in the book above referred to lead to the conclusion that they were taken from and founded upon the procedure then in force in the Irish Court of Chancery. It bears internal evidence of this from its frequent references to the city of Dublin in fixing the times for service of writs and notices. In corroboration of this is the fact that the method of foreclosure and sale in use in Ireland, which we retain to the present day, was adopted.

These rules and orders are all to be found in Book A., Chancery Rules of Practice, in manuscript, written out in a clear, legible style, with the following heading:

"The procedure of the Rules and Practice of the High Court of Chancery as they arise upon the several pleadings and proceedings in causes according to this order."

Later on in the same book is a second set of Rules, headed "A Collection of Rules and Orders in Chancery," also in manuscript, made, probably, at a later date, and a revision of the former. In this set are to be found, in explanation and support of the various rules, citations from the decisions of the Irish Chancellors, all pointing to the source from which they were evidently taken.

No doubt these rules must have been prepared and adopted at a very early date in the history of the Court. No change appears to have been made in them until 26th December,

1833, when a new or added set of rules was made. This addition was made in the last year Mr. Robie held the office of the Master of the Rolls, and it would seem that just before complaints had been made and legislation enacted to compel improvements in Chancery procedure.

Mr. Beamish Murdoch, who published his Epitome of the Laws of Nova Scotia in 1833, thus speaks of the Court of Chancery as regarded at that date: "Any one who will deliberately read through the long, unmeaning, but expensive forms of bills and answers in Chancery, and the absurd and unnecesary processes of contempt, as they are called, must be blinded by a reverence for antiquity, if he does not think them unreasonable. Those who are (as clients) made acquainted with the dilatory and unsatisfactory progress of any business which goes into Chancery, will feel convinced that there is something wrong in a system productive of such results. I have touched upon changes of an extensive nature, because I have reason to think that some alterations of importance are wished for by gentlemen whose long professional experience and high station in the Courts, and at the bar of this Province, render them the most competent judges of the extent of the evils arising from the present system. The Court of Chancery in England has become a national grievance from its expense and delays, and some of the colonies and many of the United States have no Court of Chancery, being disposed rather to submit to many of the strict rules of the common law in ordinary cases, and in important questions to resort to legislative Acts."

This extract probably reflects correctly the opinion of the profession and public at large at the time it was written, respecting the Court of Chancery in this Province. As already noticed, it was just then that the Legislature took the matter in hand, and passed a statute requiring and authorizing the making of new rules for expediting and cheapening procedure in the Court.

The new rules bear the following heading:

"COURT OF CHANCERY,—20 Dec. 1833.

"His Honour the Chancellor, by and with the advice of the Master of the Rolls, doth hereby order and direct in man-

ner following, that is to say." Then come twenty-two new rules not meriting any particular notice here. An appeal is provided for from the Master of the Rolls to the Chancellor, and, as we already know, where the amount in litigation exceeded £300, there was a further appeal to the Judicial Committee of the Privy Council.

I do not find that any new or additional rules were made during the period the office of Master of the Rolls was held either by Mr. Fairbanks or Mr. Archibald. But on the 26th August, 1846, shortly after Mr. Stewart's appointment, a number of new rules were made, and some of the previous orders were rescinded. Mr. Stewart, during his incumbency of office, continued from year to year to promulgate new rules, doing away with many of the old and cumbersome ones, and generally improving the mode of procedure. It will be sufficient to give the date of their enactment to shew how assiduously the last Master of the Rolls was working to reform the procedure of the Court of Chancery, and to clear away many objectionable features which had grown up in the course of years. The succeeding new rules and orders were made in rapid succession as follows: 1 Sept., 1846; 31 Dec., 1847; 17 Jan., 1848; 27 Jany., 1848; 15 May, 1848; 20 Nov., 1848; 4 Jan., 1849; 13 Dec., 1849; 4 June, 1849; 29 Jany., 1850; 31 Jany., 1850; 1 March, 1850; 2 March, 1850; 7 Jan., 1851; 25 Feb., 1851; 13 March, 1852; 5 May, 1852; 4 May, 1852; and 14 Dec., 1852.

It would, of course, be out of place in a sketch of this kind to discuss or comment on the great changes effected in Chancery methods by these rules, but by any one sufficiently interested critically to make an examination, it will be found that many of the reforms in practice subsequently adopted in our present Judicature Act were brought into force.

That the Court of Chancery did a large and increasing share of the judicial business of the Province is evident from the number of cases entered. From the records it appears that up to the year 1799 there were heard and determined 133 causes and matters, and altogether from the year 1751 until the year 1856, when the Court was abolished, 1,904, which is sufficient proof that in its latter years it was kept busily employed.

Among the many professional men who practised before the Court are the names of those familiar to us and distinguished in our political and judicial annals. Gibbons, at one time Solicitor-General, and later Attorney-General, for the Province; Monk, who subsequently became a Judge of our Supreme Court; Blowers, at one time Chief Justice; Richard John Uniacke, once Attorney-General; Foster Hutchinson, one of our Supreme Court Judges; Robie, who became first Master of the Rolls; Young, who became Chief Justice; Johnston, later an Equity Judge; and John W. Ritchie, his very able successor. There were many others, whose names time alone prevents me from mentioning. The well-known reputation of these lawyers is a sufficient guarantee that, especially in later times, the matters litigated in the Court of Chancery must have been tried with learning and accurate knowledge of equity jurisprudence. It is not my intention to follow and point out in detail the proceedings of the Court of Chancery during the period the Lieutenant-Governor was Chancellor and sole Judge of that Court—not that the records do not afford abundant material both interesting and instructive, but, properly to tell the history of the Court from the year 1825 until it ceased to be in 1856, demands the remaining portion of my paper.

The business of the Court of Chancery had gradually increased, and the Governor had for some years been striving to have a regular Equity Judge appointed. In 1818 Lord Dalhousie, then Governor, had actually commissioned Chief Justice Blowers as Master of the Rolls, but on reference to the Imperial Government it was disapproved of, and the commission cancelled. No reason is assigned for this, and I only assume that the Home Government so refused because the two positions were incompatible.

On Tuesday the 14th February, 1826, the Lieutenant-Governor by message informed the Assembly that, having experienced considerable difficulty in discharging his duties as Chancellor for want of a competent legal assistant, unconnected with any of the common law Courts of the Province, he had deemed it his duty to represent to his Majesty the necessity of appointing a Master of the Rolls, and had at the same time recommended Mr. Robie for the appointment.

The King having approved this, his Excellency now suggests to the Assembly the expediency of their making suitable provision. He had commissioned Mr. Robie as Master of the Rolls under a conviction of the necessity of the office. On Tuesday the 21st February the message received from his Excellency relating to the appointment of Master of the Rolls, upon the second reading of a resolution of the committee that it was expedient to make a suitable provision for this office, underwent considerable discussion. It was supported by the Speaker, Messrs. Fairbanks, Lawson, Uniacke, and Fraser, on the ground that his Excellency had experienced difficulties in presiding in the Court of Chancery, having felt himself not altogether competent to decide upon the matters which came before him; that it was a boon which his Excellency deserved from his zeal for the public service and the general interest of the Province; that the recommendation not only came from his Excellency, but also from his Majesty's ministers; and that the peculiar favours which this Province had received from the mother country had every claim upon respect and gratitude. Mr. Young considered that it would be highly improper to run in the face of his Excellency's recommendation, but when he considered the very heavy expense the judicial establishment was to the Province, and that it was the first appointment of a Master of the Rolls throughout the British foreign possessions, it would be well to pause before they made the appointment. He therefore recommended it to be limited to the period of his Excellency's administration—this mode, he thought, would be treating his Excellency's message with more distinguished consideration, and would enable the Province to judge whether the advantage arising from the office was commensurate to the expense. Messrs. B. DeWolf, W. H. Roach, and Church strongly opposed the measure. The committee divided, and the question was carried, twenty voting for it, and ten against it. The bill subsequently passed this session giving £600 a year permanently as salary of the Master of the Rolls. Mr. Robie was made Master of the Rolls. The Act which thus made the first provision for Master of the Rolls will be found in the Provincial Statutes, Chapter XI., passed in the year 1826. It is not otherwise of importance than as fixing the salary in lieu of all other charges or fees.

Simon Bradstreet Robie was by Royal commission appointed first Master of the Rolls for the Province of Nova Scotia on the 5th December, 1825, and held that office until his resignation in 1834. His commission is duly registered in the record book of office, and I give it in full. The subsequent commissions to his successors were in the same language.

"George the Fourth, by the Grace of God, etc., etc. To our Trusty and well-beloved Simon Bradstreet Robie, Esquire, Greeting.

Having taken into our Royal consideration the loyalty, integrity, and ability of you the said Simon Bradstreet Robie, do by these presents constitute and appoint you to be Master and Chief Clerk of the Rolls and Records in and belonging to our Court of Chancery of and in our said Province of Nova Scotia. To have, hold, exercise, and enjoy the said office of Master and Chief Clerk of the Rolls and Records of our said Court of Chancery with you the said Simon Bradstreet Robie during our pleasure, together with all the powers and authorities to said office belonging, with all and singular the rights, salaries, fees, profits, and advantages thereunto belonging, in as full and ample a manner as the same can be held and enjoyed. In testimony whereof, etc., etc., witness our trusty and well-beloved Lieutenant-General, General Sir James Kempt, Lieutenant-Governor, Commander-in-Chief, and Chancellor, etc.
Dated 5th December, 1825."

Mr. Robie entered on the duties of his office, attending to all the judicial work prior to this date performed by the Chancellor. The Minute Book of Chancery kept during his time indicates that the usual business of a Court of Equity was carried on before him as Judge of the Court. After glancing through the various entries of causes and matters heard before him, I find nothing of special note except the additional rules first passed during his term of office, to which I have already made allusion.

(To be continued.)

HALIFAX. CHARLES J. TOWNSHEND.

EDITORIAL REVIEW.

Amendments to Rules of Court—Ontario.

The following amendments were made on the 17th February, 1900, by the Supreme Court of Judicature to the General Rules of Court:—

26.—Clause 4 of sub-section *b* of Rule 26 is amended by adding thereto the following:—"When the same shall be transmitted to the Central Office."

341.—Rule 341 is hereby amended by striking out the word "Toronto" and the words "or in a Divisional Court," in the second line thereof.

792.—Sub-section 2 of Rule 792 is hereby repealed, and the following substituted for it:—"(2) The party making the motion shall not be entitled, unless by leave of a Judge or of the Court, to set it down until the record and exhibits have been, and it shall be his duty to cause them to be, transmitted to the Central Office."

The effect of the amendment to Rule 26 is that records, exhibits, affidavits, and papers relating to causes before the Court in Toronto, when the matters to which they relate are concluded, shall be taken from the office of the Registrars of the High Court to the Central Office.

Rule 341 is amended to conform with Rule 26 as amended.

The alteration in Rule 792 is doubtless the outcome of a complaint which is very often heard, viz., that when an appeal comes on for hearing before a Divisional Court the record and exhibits are not at Osgoode Hall at all. The applicant cannot henceforth (except by leave) have his motion set down until these papers have been transmitted to the Central Office.

Salaries of County Court Judges—British Columbia.

The County Court Judges of British Columbia, five in number, in 1898 memorialized the Governor-General in regard to their salaries, pointing out that in 1889 it was arranged between the Dominion Government and the Govern-

ment of British Columbia that each County Court Judge should on appointment receive $2,400 per annum as salary from the Dominion Government, and that the Provincial Government should supplement that salary by $500 per annum in consideration of each Judge acting also as stipendiary magistrate. The Judges were appointed under these circumstances, and they received the two salaries until the end of November, 1898, when the $500 was cut off by the Provincial Government. They further observed in their memorial that even the $2,900 was far from being an adequate payment for the services rendered, having regard to the jurisdiction possessed by them, which is larger than that exercised by the County Courts in Great Britain or in any other Canadian Province, extending to $1,000 in contract or tort, $1,000 by way of counterclaim, $2,500 in equitable matters, and to any amount by consent, and in mining matters; in addition to which, they have acted as local Judges of the Supreme Court without extra salary.

In June, 1899, the Secretary of State wrote to the Lieutenant-Governor of British Columbia transmitting a minute of the Privy Council, and remarking that an arrangement was concluded and acted upon with respect to the appointment and salaries of the County Court Judges which, in good faith, should be carried out, and requesting that the salaries withheld be restored.

The salaries not having been restored, there is naturally a good deal of sympathy for the County Court Judges, who have no means of redress other than petitioning the Crown. Of course, they may resign their offices; but a gentleman who abandons practice upon receiving what is considered an appointment for life, cannot go back to it with any assurance of success. It must be remembered that the British Columbia County Court Judges receive no fees additional to their salaries, as, *e.g.*, Ontario Judges do for Surrogate Court duties, and that the expense of living is higher on the Pacific coast.

A Professional Philistine.

In his lecture on Legal Ethics, of which a synopsis is printed in this issue, Mr. Justice Rose describes a barrister or solicitor as he should be. The following letter, written by a

barrister living in a city in Ontario, is worthy of attention, as a self-revelation of a professional man as he should not be. The spelling, punctuation, and construction of the sentences, are all his own. The original, too, is signed with his own name, which perhaps forbids the supposition, suggested by the date, that it was intended as a Valentine!

Feby. 14th, 1900.

——— ———, Esq.

Sir,—For pure unadulterated gall, you take the cake. You have more nerve than anyone I have struck for a long time to go and give my tennants notice to pay the rent to no one but you. That proceedure would be bad enough for Ireland but not Canada. I told you a month ago that I would give you an order on my tennants so that you could go and get the rent yourself and I stated the circumstances connected with it. I told you the first rent would be due about the 24th, of February and the other the 1st, of March, and you said it would be alright, then instead of proceeding in a businesslike way, you pursue a course that no one but a shyster would do. After this you need not expect me to treat you in a business way, and I give you notice, that if I ever catch you meddling with my tennants, that I will stand you on your head. You may show this letter to your lawyer or to the Police Magistrate, if you wish, I will simply carry out what I am telling you.

Your truly,

Ancient The Creditor of Modern.

(A commentary in verse.)

I.

In our own day (*a*), a suitor yclept Good,
Trusted a plea he urged would muster pass:
That growths ought nowise to be understood
As hay which had been *cultivated* grass.

(*a*) *Regina* v. *Good*, 17 O. R. 725; where it was contended by the defendant, moving to quash a summary conviction, made under the authority of a section of the Indian Act which prohibited the removal of "hay" from a Reserve without a license, that natural grass only was signified. The Common Pleas, however, construed the term as applying to the artificial product as well.

The Court much pained him by its curt address:
"You cannot here win quittance for this wrong—
The fine escape Brant's Justice did assess—
By pretexts which to fraudulence belong."

II.

When marching last through Gaul, Rome's puissant Goth
Felt it incumbent on him to ordain
(Breach of the mandate to unvial his wrath,)
That all from loose marauding should abstain.

Came one who guilt disclaimed in wresting hay
As being grass—in terms reserved alone;
The sophism, alack! did little weigh,
Since for the crime his life had to atone (*b*).

J. B. MACKENZIE.

(*b*) "On their way the army passed through the territory owned by the monastery of St. Martin of Tours, the greatest saint of Gaul. Here the King commanded them to abstain religiously from all depredations; taking only grass for their horses, and water from the streams. One of the soldiers, finding a quantity of hay in the possession of a peasant took it from him, arguing that hay was grass, and so came within the permitted exception. He was, however, at once cut down by the sword the King exclaiming: 'What hope shall we have of victory if we offend the blessed Martin?'" Life of the Emperor Theodoric (Heroes of the Nations Series.) By Thomas Hodgkin.

CORRESPONDENCE.

"An Advocate Highly Experienced."

To the Editor of THE CANADIAN LAW TIMES.

Sir,—I enclose you a very funny circular which I received to-day. It may serve to amuse your readers, If you think it worth reproducing in your columns.

Yours truly,

M. J. GORMAN.

Ottawa, 6th February, 1900.

Paris, 1st February, 1900.

Dear Sir,—I have the honour to inform you that I represent in all matters of Court at Paris and any other place of France, to say:

Procedure, acts of society, divorces, liquitations, bankrupties, encash and recoverment of debts, debtors disappeared, successions, inheritences, etc.

In case of want of a correspondent in France you will find in me an advocate highly experienced in which you may have all confidence.

If you desire I will give you references of first order.

Quite to your orders believe me to be,

Dear Sir,

Yours very respectfully,

BOOK REVIEWS.

A Treatise on the Law of Mortgages of Real Estate. by Edwin Bell and Herbert L. Dunn, of Osgoode Hall, Barristers-at-Law. Toronto: The Canada Law Book Company. 1899.

This a work of considerable compass, by no means a mere hand-book, and yet such an one as may well serve for a students' text-book. By eliminating everything which does not strictly bear upon the law of mortgages as administered in the Courts of the Provinces of Canada other than Quebec, the volume has been kept down to a moderate size. The authors—already favourably known by reason of their book of forms—state the law as they find it laid down in decided cases, without expressing their own views on points which have not been raised in the Courts, or upon which there is a conflict or uncertainty of opinion. There is probably no subject—unless it be Municipal Corporations—on which there is a greater abundance of Canadian authority than Mortgages of Real Estate. The task of collecting, digesting, and collating all the Canadian cases has been a heavy one, and that of making a selection of English cases no less arduous. The industry displayed is commendable; the division of the work into parts—a very important matter—is upon a good plan; and there are other features which are worthy of praise; but these must be left for the reader to discover.

The Law as to the Appointment of New Trustees by J. M. Easton, of the Middle Temple, Barrister-at-Law. London: Stevens & Haynes, Bell Yard, Temple Bar.

In this very useful manual Mr. Easton gives, in concise and convenient form, the law bearing upon the appointment of new trustees, whether effected with or without the aid of the Court. The latter class of appointments may be made either pursuant to express powers contained in the trust instrument, or by the exercise of statutory powers available for that purpose. Mr. Easton deals fully with both modes of appointment. Although the English Trustee Act of 1893, sec. 10, which contains the statutory provisions respecting the appointment of new trustees out of Court now operative in England, is not in force in Ontario, the provisions of Lord Cranworth's Act, which it superseded, and which we had adopted and still retain, are fully discussed by Mr. Easton. The circumstances under which the power of appointing new trustees may and should be exercised, without resort being had to the Court, are fully and clearly set forth, as are likewise the advantages and disadvantages of the insertion of express powers in trust instruments for the substitution of trustees. The form of instruments of substitution or appointment is also considered.

The author then proceeds to discuss the appointment of new trustees by the Court, under its jurisdiction inherent and statutory, by consent and in opposed proceedings, against the wishes of beneficiaries, and in opposition to the desire of the old trustees.

An important chapter is that dealing with the modes of transfer of the trust estate upon a change of trustees, whether effected out of Court or by the Court. A special chapter is devoted to the appointment of new trustees of charities, but the statutory provisions therein dealt with are peculiar to England.

The author also devotes a short, but comprehensive and useful, chapter to the rights, powers, and liabilities of old and new trustees.

He concludes by dealing with the costs of appointing new trustees and the procedure to be followed on an application to the Court under the English practice.

Appendices of precedents and statutes, and a well arranged index, complete a very compact little volume of some two hundred pages. The arrangement of the book is satisfactory and the style of the writer clear. Useful side notes are found throughout the work, and the cases referred to are embodied in the text. Considerable industry has been shewn in the collection of the authorities bearing upon the subject of the text. The typography and binding are both creditable to the publishers.

CARLETON LAW ASSOCIATION REPORT, 1899.

The members on the roll of the association number 73, including 3 honorary members, being an increase of 1 over last year, after striking off the names of members who retired or died.

The annual fees paid amounted to $245. The stock taken by new members was $70, of which half the amount, viz., $35, was paid, and also the sum of $50, being the balance due by 10 members on stock subscriptions from the previous year. The grant from the Law Society of Upper Canada was $440, and that from the Ontario Government was $45.45. These sums, with $4.99 interest credited by the bank, amounted in all to $820.44.

The sum of $455.15 has been expended in the purchase of books, and after the other expenses of the association have been paid, a balance of $81.89 remains in the treasurer's hands. There have been 253 volumes added to the library during the year, the total number of books now being 1,936, the value of which is about $5,800, on which there is an insurance of $4,000. The librarian reports that 6 books have been lost during the year, 5 of which have been removed from the library in her absence, and 1 of which has not been returned by a member who took it to the court room. The purchasing committee have not taken any action upon the motion passed on 23rd June last, authorizing them to sell old duplicate copies of text books on hand.

The committee appointed to confer with the county council about the erection of an addition to the court house, have met with some encouragement from that body. In March last the committee addressed the council on the subject, and a resolution was adopted by the latter, recognizing the pressing necessity of increased accommodation, and pledging itself to erect an addition as soon as the funds would permit. The committee again addressed the council in December, urging the carrying out of this resolution, and a notice has been since received from the county clerk, asking

the association to send representatives to meet the gaol and building committee of the council on the 22nd instant to consider the proposed alterations in the court house.

On the 22nd June last the association lost by death one of its most prominent members, in the person of the late Martin O'Gara, Q.C., LL.D., who was one of the benchers of the Law Society of Upper Canada for several years. Upon the recommendation of this Association, F. H. Chrysler, Q.C., was appointed a bencher to fill the vacancy for the balance of the term.

The County Court Judges have so far acceded to the request of this association as to divide the list of cases at the regular sittings of the Ottawa Division Courts, so that only the first 100 summonses will be issued for the first day of each sittings, but they have not yet seen their way to act on the other recommendations of the association concerning these Courts.

A minimum conveyancing tariff for the city of Ottawa has been adopted by the association during the past year, but, as it has not yet been signed by all the members of the profession, it has not been possible to bring it into force.

During the month of August last the inspector of county law libraries visited our library and expressed himself as very well satisfied with its condition, which, he said, was among the best in the Province.

The following officers were elected for the year 1900:—President, J. I. MacCraken; Vice-President, R. G. Code; Treasurer, J. F. Orde; Secretary, E. F. Burritt; Trustees, W. D. Hogg, Q.C., F. H. Chrysler, Q.C., M. J. Gorman, J. Bishop, and J. P. Fisher.

THE

CANADIAN LAW TIMES

APRIL, 1900.

THE LOCAL IMPROVEMENT SYSTEM.*

IT is, no doubt, very commonly believed—even among those who know something about our local improvement system—that it is of American origin; but this is a mistake. Its fundamental principle,—viz., the right of the local authority to assess and levy from the owners of real estate specially benefited by the construction of a local work a share, at least, of the benefit thus conferred—may be traced back to the statutes of 6 Henry VI. c. 5 (1427) and 23 Henry VIII. c. 5 (1531), which authorized the levy of a rate upon land owners to meet the cost of constructing sea-walls and similar protective works; and—as applied to municipal improvements—it was embodied in an Act of 1662 (*a*), entitled "An Act for repairing the highways and sewers and for keeping clean the streets in and about the cities of London and Westminster," etc., and again in an Act passed in 1667 (*b*), to regulate the rebuilding of the city of London after the Great Fire (*c*). A local improvement system "was in full operation in London at a period when the American colonies were in their infancy, and the United States, to which they gave birth, were a full century yet unborn" (*d*).

*Based upon a portion of the forthcoming edition of THE MUNICIPAL MANUAL, (being the 6th edition of HARRISON'S MUNICIPAL MANUAL) by C. R. W. Biggar, M.A., Q.C. Toronto: The Carswell Co., Limited.

(*a*) 14 Car. II. c. 2.

(*b*) 19 Car. II. c. 3.

(*c*) See also 22 & 23 Car. II. c. 17; 7 Anne c. 9.

(*d*) Blunden,—"Local Taxation and Finance," (London, 1895), p. 91.

The Metropolis Local Management Act, 1855, (*e*) and the amending Act of 1862 (*f*) now provide that where a "new street" has been or is to be paved by the local authority, the frontagers shall pay on demand the expense —or the estimated expense—of the work according to an apportionment to be made by the local authority, which may charge owners of land in a less proportion than owners of house property, and may accept payment of the amount apportioned or charged in respect of each house, by instalments spread over twenty years. The local authority is not bound to charge the frontagers ratably inter se, according to frontage or otherwise; and, if the requirements of the Act have been complied with, the apportionment cannot be questioned except for mala fides in the making of it. As to the expense of constructing sewers, similar powers are given to the local authorities by s. 80 of the first mentioned Act (*g*) and by ss. 52-57 of the Act of 1862 (*h*); but the apportionment of expense in the latter case is subject to an appeal to the Metropolitan Board of Works.

Again,—s. 8 of the Artisans Dwellings Act, 1882, (*i*) provides—in case of the demolition of what is therein styled "an obstructive building"—that "where, in the opinion of the arbitrator, the demolition . . . adds to the value of . . . other buildings . . . the arbitrator shall apportion so much of the compensation to be paid for the demolition of the obstructive building as may be equal to the increase in value of the other buildings amongst such other buildings respectively; . . . and the local authority may make and levy improvement rates on the occupiers of such premises accordingly."

Lastly,—ss. 23, 36, 41, 62, 150, and 160 of the Public Health Act, 1875, (*j*) and s. 3 of the Public Health (Water) Act, 1878, (*k*) authorize the imposition, by local or

(*e*) Imp. Stat, 18 & 19 V. c. 120, s. 105.

(*f*) Imp. Stat. 25 & 26 V. c. 102.

(*g*) Imp. Stat. 18 & 19 V. c. 120.

(*h*) Imp. Stat. 25 & 26 V. c. 102.

(*i*) Imp. Stat. 45 & 46 V. c. 54, re-enacted as ss. 38-39 of the The Housing of the Working Classes Act, 1890, 53 & 54 V. c. 70.

(*j*) Imp. Stat. 38 & 39 V. c. 55.

(*k*) Imp. Stat. 40 & 41 V. c. 25.

sanitary authorities, of "private improvement rates" for the expenses of works done by these authorities upon default of the property-owners (after notice) to comply with regulations in respect of house drainage, water-closets, water supply, street paving, etc.,—a method which we have adopted in those sections of the Municipal Act which authorize councils to pass by-laws for "compelling" property owners to execute certain works,—coupled with s. 703, which empowers them in case of default on the part of the property-owner, to do work at the expense of the person so in default, and to collect the amount thus expended by action or distress, or in the same manner as municipal taxes.

The principle of special assessments for local improvements is recognized also in France (*l*), in Belgium (*m*), and in Germany (*n*); but it is in the United States of America that the system has attained its highest development (*o*)—for reasons which are especially applicable to loosely-built and widely-extended towns and cities—(where some of the territory within the corporate limits is urban only in name)—and which have exceptional weight and influence with governing bodies where the Legislature has seen fit to limit the amount which may be annually raised by general rate. A summary of the legislation of various States on the subject will be found in c. XIX. of Judge Dillon's invaluable work on Municipal Corporations; and in s. 761 the learned author sums up the general result of the American decisions relating to special assessments in respect to local improvements—pointing out that:—

1. A local assessment upon property immediately and specially benefited by a local improvement, although resting

(l) "*Loi relative au desséchement des marais*," *16 Septembre, 1807.*

(m) Leemans,—"*Des Impositions Communales en Belgique.*"

(n) Leidig,—"*Preussiches Stadtrecht*;" Loening,—"*Verwaltungsrecht*;" Neumann,—"*Die Steuer und das offenntliche Interesse*;" Ludwig-Wolf,—"*Sachsische Gesetzgebung über Wegebau.*"

(o) The first American statute giving power to impose local assessments for local improvements is an Act of the Assembly of the Province of New York, passed in 1691, "for regulating the buildings, streets, lanes, wharfs, docks, and alleys of the city of New York." It authorized the mayor and aldermen "to impose a reasonable tax upon all houses in the said city, according to the benefit they shall receive thereby, for and towards the making, altering, etc., of the said drains, sewers, pavements," etc.

for its foundation upon the taxing power, is in many respects distinguishable from a tax.

2. Special benefits to the property assessed—i. e., benefits received by it beyond those received by the community at large—form the only true and just foundation upon which local assessments can rest.

3. The assessment may be made on benefited lots in proportion to their superficial area or to their assessed value.

4. Where the property is urban, and is laid out in blocks or lots of equal depth, all abutting upon the local improvement, and there is nothing in the nature or circumstances of the case which will cause an assessment according to frontage to work manifest injustice—the assessment may be so made.

5. But the method most generally adopted,—and the only one which (in the author's judgment) is right in principle and equitable in its practical workings—is to assess the cost of the work (or a definite part or share thereof) ratably upon the several properties specially benefited thereby according to the special benefit which each separate lot or parcel of property actually and separately receives therefrom.

Although the principle of the local improvement system was recognized in this Province by s. 81 (5) of the Municipal Act of 1849 (*p*) and s. 9 of the Act of 1853 (*q*), the foundation of the procedure now contained in ss. 664 et seq. of this Act was laid in 1850 (*r*) by the Act of 22 V. (2nd sess.) c. 40. This statute authorized the council of every city to pass by-laws:—

2. For assessing and levying upon the real property to be immediately benefited by the making, enlarging or prolonging of any common sewer, or the opening, widening, prolonging or altering, macadamizing, grading, levelling, paving

(*p*) 12 V. c. 81.

(*q*) 16 V. c. 181.

(*r*) Special assessments for drainage works were introduced in 1858 (22 V. c. 99, ss. 271-272), when township councils were authorized—upon a petition sufficiently signed—to make an assessment of so much of the cost of draining any locality as should not exceed the benefit derived from such drainage. The assessment was to be according to the proportion of benefit received. The principle of assessing only up to the amount of benefit received was soon abandoned; but, with this exception, the present Municipal Drainage Act is but an amplification of the two sections of the Act of 1858.

or planking of any street, lane or alley, public way or place, or of any sidewalk therein, on the petition of at least two-thirds in number and one-half in value of such real property of the owners of such real property, a special rate, sufficient to include a sinking fund for the repayment of debentures, which such councils are hereby authorized to issue in such cases respectively on the security of such rates respectively, to provide funds for such improvements.

The powers conferred by this Act have since been extended to all other local municipalities (*s*), and its principle has been from time to time applied to new works and undertakings. In 1871 bridges were included (*t*); in 1880 the deepening of streams, drainage works, and the curbing, sodding, and planting of streets (*u*); in 1890 culverts and embankments (*v*); and in 1892 water and light mains (*w*). It has been found necessary to authorize councils to assume out of their general funds the rebate (if any) allowed on corner lots (*x*), the cost of work at street intersections and opposite exempt properties (*y*), a share of the cost of bridges, culverts, embankments, of the opening up and extension of streets, and of certain improved sidewalks (*z*), and to make special assessments only for the balance; but, except in these cases, practically the whole cost of a work undertaken as a local improvement must be locally levied.

The mode of ascertaining the property to be assessed has been frequently altered. From 1859 to 1882 benefit was the only criterion of assessability; and all benefited property, wherever situate, was assessable. In the latter year, however, locality became in certain cases the test, the rates being imposed "upon the real property fronting or abutting upon the

(*s*) To towns by 31 V. c. 30, s. 35 (1868); to villages by 34 V. c. 30, s. 10 (1871); and to townships by 50 V. c. 29, s. 48 (1887).
(*t*) 34 V. c. 30, s. 11.
(*u*) 43 V. c. 27, s. 10.
(*v*) 53 V. c. 50, s. 38.
(*w*) 55 V. c. 43, s. 63.
(*x*) S. 673 (4).
(*y*) S. 679 (1).
(*z*) Ss. 674 (1), 675, 678.

street or place whereon or wherein" the work was done (*a*), and in 1883 this rule was made applicable to all cases (*b*). It was, however, found to be too arbitary; and exceptions became necessary, as in the case of the rule which required that the whole cost of the work should be locally levied. Accordingly an amendment was made in 1885, whereby property benefited, though not abutting, might be included in assessments for the cost (or part of the cost) of bridges, culverts, embankments, or the opening up and extension of streets (*c*). In 1888 the restriction of the assessment to abutting property was removed in the case of sewers of greater capacity than that required for the drainage of the particular streets in which they were laid (*d*), and in 1892 in the case of all works in certain townships (*e*). It was completely swept away in 1896; and the present rule, which is the same as that in force prior to 1882, was then adopted.

Alterations have also been made in the method of apportioning the amount to be levied among the various parcels of property to be assessed. Under the Act of 1859 the council had the option of adopting any one or more of four modes, viz.:—(1) by rate on assessed values exclusive of benefit; (2) by rate on assessed values including benefit; (3) by frontage rate: or (4) according to the proportion of benefit received by each parcel of land. By the Act of 1866 (*f*) this option was taken away, the first mode—viz., by rate on assessed values exclusive of improvements—being the only one authorized. In 1881 a further change was made by which the respective frontages of the lots became the standard for determining their respective shares of the sum to be levied, the rate being one per foot of frontage. This has since remained the general rule, subject to the decision of the Courts that the

(*a*) 45 V. c. 23, s. 4. It is possible that the effect of other sections of the Act as then amended would have restricted the assessment to property which was actually benefited; but this does not appear to have been the intention of the framers of the amendment. See R. S. O. 1877 c. 174, ss. 551 (1), 552, 553.

(*b*) 46 V. c. 18, s. 612 (4).

(*c*) See s. 674 (2).

(*d*) See s. 673 (2).

(*e*) See s. 665 (3).

(*f*) 29 & 30 V, c. 51, s. 301.

rate upon non-abutting property need not be the same per foot as that upon abutting property.

In assessments made upon this basis the fact of benefit is of importance only in determining the property which is to be assessed. The apportionment of the amount to be levied among the various parcels of such property depends solely upon their measurement, the relative amounts of their respective benefits being altogether disregarded. The resulting distribution of the burden is equitable in simple cases—e. g., in that of sidewalks or pavements in urban localities where abutting property is alone assessed, and where the lots are of approximately equal depth and of similar capabilities; but in other cases it is sometimes most unfair. For instance,—suppose that by the construction of a bridge three lots of equal frontage are benefited to the respective amounts of $50, $100, and $500. According to this method each of them will nevertheless be assessed for exactly the same amount; and if—as is quite conceivable—these lots alone receive any benefit, and the bridge costs $2,000, of which the municipality assumes one-half (*g*), each of these proprietors will be charged $333, one of them thus being compelled to pay nearly seven times the amount of the increase in value of his property, while another pays but two-thirds of the amount of his benefit.

Possibly because of the injustice which must occasionally result from an assessment according to frontage, another method has been introduced since the passing of the Act of 1866. In 1882 townships were authorized (if they saw fit) to assess each parcel of property benefited by a bridge or culvert, or by the opening up and extension of a street, etc., according to the proportion of the whole amount of benefit received by that parcel (*h*); and in 1892 this power was conferred, in the case of all works, upon townships any part of which lies within five miles of a city containing 50,000 inhabitants or over (*i*). This method of assessment is scarcely more defensible than that according to frontage. If—upon

(*g*) This is the limit of its power. See s. 675.

(*h*) See s. 674 (3).

(*i*) See s. 665 (3 proviso). This is the method of assessment u de the Municipal Drainage Act (R. S. O. c. 226.)

appeal to the Court of Revision or the County Judge—the assessment proposed by the engineer is varied in respect of a single lot, a compensating variation must also be made in respect of another or others, in order that the amount which is to be raised may remain the same; and since the assessment is based upon the *proportion* of benefit received, it may be necessary—in order to effect a proper apportionment—to have every assessed owner and his witnesses before the Court. Furthermore, considerable difficulty arises when lands have been benefited but have at the same time been injuriously affected. If the benefit and damage are set off one against the other (*j*) an assessment cannot be equitably made upon the benefit which has been thus set off; while, on the other hand, it may not be equivalent in amount to a share of the whole cost proportionate to the benefit. *E.g.*—suppose that by a work costing $600 (including land damages) lot A. is benefited $100, and lot B. is benefited $200, but damaged $300, no other land being affected. The benefit to lot B. being set off against the damage, its owner will receive but $100 as his compensation. He therefore contributes toward the cost of the work $200, the amount of the benefit to his property. Lot A. must then be assessed for the balance of the cost, viz., $400, or four times the amount of the benefit which it has received. Properly speaking, damage and benefit should be kept entirely distinct, lot A. being charged $200 and lot B. $400, but the owner of the latter recovering full compensation for all damage.

This procedure, however, is not free from objection. In following it, the amount of the benefit and the amount of the damage must be separately estimated. Since each is properly determined by ascertaining the difference in the market value of the land due to the construction of the work, to determine either of them separately, without regard to the other, is a task of extreme complication; and it is most unlikely that the resultant effect of the decisions of the

(*j*) In cases under the Municipal Act benefit and damage must be set off: see s. 437; Re Richardson and City of Toronto, 14 O. R. 491 (1889); Re Pryce and City of Toronto, 16 O. R. 726, 20 A. R. 16 (1892): and apparently also in cases under the Municipal Drainage Act: Township of Ellice v. Hiles, 23 S. C. R. 429 (1894), at pp. 448-9; Re Thackeray and Township of Raleigh, 25 A. R. 226 (1898).

Court of Revision as to benefit, and of an arbitrator as to damage, will be to place the owner of lot B. in precisely the same position as if both these matters had been determined by the same tribunal.

All the amendments already noted—together with many others of less importance—have been from time to time grafted upon the original Act of 1859. By twenty-three amending Acts, and in nine consolidations, about one hundred and twenty variations (exclusive of many verbal changes) have been made in that short statute, and the three pages which formed the original Act have been expanded to eighteen pages in the present revised statute. Yet during all these forty years no attempt has been made to deal with the subject in a comprehensive or scientific enactment. The annual alterations and additions have been made upon principles—if any—constantly varying, and often with reference to some particular case of assumed injustice or hardship. In the result, our local improvement law has become—to use the language of Osler, J.A.—"a patchwork of clauses," which Sir William Meredith, C.J., considers "complicated, cumbrous, contradictory"—an opinion fully concurred in by Sir George Burton, C. J. O., who adds that the result is "sometimes illogical, and frequently unjust." (*k*)

It is not surprising that questions innumerable, and sometimes insoluble, should arise when one attempts to interpret such a chaotic conglomeration of heterogeneous clauses; and the reasons why they have not proved more fruitful in creating litigation are (probably) their very complexity, the consequent uncertainty of success, and the comparatively small amount involved (as a rule) in any individual case.

In view, therefore, of the self-evident fact that some scientific and well considered enactment is needed to remove the ambiguities, anomalies, and inconsistencies of the present local improvement sections, it may not be amiss to discuss the general lines upon which such an enactment should be based, in order that it may be at once equitable, simple, and

(*k*) Re Robertson and City of Chatham, 30 O. R. 158; 26 A. R. 554 (1899).

of practical applicability. Considerations of space here necessarily confine the discussion to the general principles which should govern the determination of the respective shares of the cost of an improvement to be repaid by general and special rate, and the apportionment of the amount to be locally levied among the property owners to be specially assessed.

The principle upon which ordinary municipal taxes are assessed and levied is that which was laid down in 1776 by Adam Smith (*l*), viz., that:—

> "The subjects of every state ought to contribute to the expense of the government as nearly as possible in proportion to their respective abilities, *i.e.*, in proportion to the revenue which they respectively enjoy under the protection of the State;"

in order to which the Assessment Act provides (*m*) that,—"All municipal . . . . taxes . . . . shall be levied equally upon the whole ratable property, real and personal, of [in] the municipality . . . . according to the assessed value of such property." (*n*)

Special local assessments may seem at first to be inconsistent with the above general principle; but this inconsistency is more an apparent than a real one, at least in two cases. First, where the value of land has been directly increased by the construction of a municipal work, it seems fair that the owners of property thus specially benefited should bear the expense of the work to the extent to which their ability to pay has been enhanced thereby. Such property-owners suffer no pecuniary loss, since they receive, in the increased value of their lands, an equivalent for the money which they are thus called upon to repay to the municipality (*o*).

(*l*) "An Inquiry into the Causes and Nature of the Wealth of Nations," (Adam Black, Edinburgh, 1828), vol. III., p. 368.

(*m*) R. S. O. c. 224, s. 6.

(*n*) The resulting distribution of burdens would be practically identical were the value of real property alone taken as the basis of assessment; and in any case taxable personalty forms no more than a small fraction of the total taxable property in any municipality.

(*o*) See per Strong, J., in Schenley v. Commonwealth, 36 Pa. St. 29, 57 (1859); per Woodward, J., in McGonigle v. Allegheny City, 44 Pa. St.

Second, if a work is (or will be) required everywhere in a municipality, the amount levied from each individual will be the same, whether he pays his share of the aggregate cost, or the whole cost of the particular part of the work especially referable to him; provided only that the assessment is in both cases upon the same basis.

To each of these cases a different mode of assessment is suitable; and each will be found to apply to different classes of municipal works.

A municipal corporation in undertaking a work may act in any one of three capacities:—

1. It may perform the functions of a governing body, as it usually does in constructing pavements or bridges, or in procuring the cleaning, lighting, etc., of streets.

2. Its position may be that of a capitalist and trustee, as in the laying of water, light, or heat mains.

3. It may act as an agent for certain individuals who desire the construction of a work, but who have neither the necessary organization nor the available capital. This is most frequently its position in the construction of drainage works; but the same principle might be applied to the opening up of roads, etc., etc.

An assessment for a work constructed in the exercise of either of the first two functions is properly a tax. An assessment for the cost of a work undertaken by the corporation as an agent is more like the collection of an account for services rendered and disbursements made.

In urban municipalities such works as pavements, sidewalks, street sweeping, lighting, etc., may be required on every street, the requirements of each street being independent of and unaffected by those of any other. Where they are needed, the property is usually of higher value than where they are not, and in localities where more substantial works and more frequent renewals are called for, the owners

118, 121 (1862); and per Walker, J., in Crawford v. The People, 82 Ill. 557 (1876). This principle is, in fact, correlative to that which governs the right of a land owner to be paid out of public funds the amount by which his property may have been "injuriously affected" (*i. e.* diminished in value) by reason of a municipal improvement undertaken for the public benefit.

are in general of higher "ability" than in those where requirements are more modest and the necessity for renewals occurs at longer intervals. If, therefore, such works were carried out in every street according to its needs, the whole cost of the work directly affecting the land of an individual would be substantially the same as his share of the aggregate cost of all the works. Special assessments for the cost of constructing them on one street—before they are actually carried out on every street—may be justified on the grounds—(1) that the primary and direct effect of the work is local (though no actual enhancement in the value of property may result); (2) that the land-owners upon a street may thereby procure the class of work which they consider to be suitable and at the time when they deem it to be requisite; and (3) that (possibly venal) local authorities are thus deprived of power to unduly favour certain localities in the distribution of public works to be paid for out of general funds.

Sewers—though it may at some time or other be necessary to construct them upon every street in the town—stand upon a somewhat different footing from pavements and other like works, since their size and cost may be increased far beyond the needs of the streets in which they are constructed, by reason of the necessity that the sewage of other streets at higher levels should pass through them to gain an outlet. An equitable mode of meeting their cost would seem to be to assess locally the expense which it would be necessary to incur for the purposes of the street in which a sewer is laid, the excess of the expenditure being met out of the general rates.

In the case of assessments of the class now under discussion, the whole cost—or practically the whole cost—of the work, or of that part of the work which is referable to the street where it is constructed (*p*) should be locally levied upon the property from which direct access is or might be had to the street or sewer, the apportionment being made according to the assessed values of the various parcels, or—

(*p*) The municipality should assume the proportion of the cost referable to exempt property, probably part of the assessment on corner lots, and possibly also the cost incurred for construction across street intersections.

where the lots are of equal depth and similar capabilities—by a frontage rate.

But the list of works for which special assessments may be made has not yet been exhausted. Such works as bridges, subways, the opening and grading of streets, etc., etc., cannot be required everywhere in any municipality; nor can such works as pavements become necessary on every country highway. To assess the whole (or any arbitrary part) of the cost of such works upon neighbouring property is clearly unfair, unless the work has been undertaken by the municipality as agent of the owners, as to which see infra. But local assessment is not excluded. Resort may be had to the principle of benefit; and the amount of any increase in the value of a parcel of land due to such a work may be demanded from its owner, just as the amount of damage thereby occasioned is paid to him. Where benefit has accrued and damage has at the same time been suffered, they may be set off one against the other, and the difference paid by the party against whom the balance is found. Any expenditure upon the work over and above the aggregate benefit is—or should be—its value to the municipality at large, and ought to be paid out of general taxes.

The class of works to be next considered are those constructed by the corporation as capitalist and trustee. These are represented in the Municipal Act, by water, heat, and light mains, the whole cost of which may be locally levied. Expenditures upon works like these are virtually investments of capital, and would as a rule remain so, a sum being annually written off for depreciation and wear and tear. If they were to be realized, the profits should repay the capital thus invested; but this, in the case of municipal services, is practically impossible, since the cost to the consumer is forced down so that the return barely covers expenses. There remains taxation, and to this the same rules would seem to apply as in the case of sewers,—viz., that the cost of laying a main sufficient for the purpose of a street should be locally assessed upon the property from which direct access to the main is or might be had—*i.e.*, practically, abutting property,—the balance of the cost being borne by the municipality.

There remains the class of works which the municipality executes as agent for certain property owners, for whose particular benefit the work is carried out, and at whose request the whole expense is assessed and levied by the municipal machinery provided in the case of other special assessments. Works under the Municipal Drainage Act are undertaken upon this system, which, though not expressly recognized in the Municipal Act, is applicable in the case of bridges and like works in all municipalities, and in the case of sidewalks, pavements, etc., in rural districts (*q*). The variation between the incidence of assessments upon this basis and those assessments which the municipality makes for similar works which it has constructed in the exercise of what we have styled its governmental functions, lies in the mode in which the excess of the expenditure over benefit is to be met. Ordinarily, that excess falls upon the general rates; but in this case it must be paid by the promoters of the work—*i.e.*, the petitioners therefor and those whom they have power to bind. The rules generally applicable to the set-off of benefit against damage will apply, the difference being collected or paid by the corporation, as the case may be. By this operation every land-owner affected (whether damaged or benefited) has presumably been placed in exactly the same position as if the work had not been carried out. The proportional benefits received by each form, therefore, a standard for assessing the excess no more satisfactory than would the proportional damages suffered. Recourse must be had to "ability;" and the assessment must be made upon the petitioners and those whom they bind in proportions fixed by the petition, or according to the assessed values of their respective properties. By adopting this basis of assessment, the practical difficulties attending an assessment according to the proportion of benefit received are also overcome.

Toronto. C. R. W. BIGGAR.

(*q*) It might also be applied in certain cases to sewers and water and light mains; but in such cases somewhat different considerations arise.

HISTORY OF THE COURT OF CHANCERY IN NOVA SCOTIA.

(Concluded.)

On the 5th August, 1834, Charles Rufus Fairbanks was appointed Master of the Rolls on the resignation of Mr. Robie, and filled that position until his death in 1841. I find in the record books the following account of his first taking his seat as Master of the Rolls:

"Monday, 18th August, 1834.

"The Court opened in the Court House in the Province Building this day at 11 o'clock.

Present—His Honour Charles Rufus Fairbanks, Master of the Rolls.
Nathaniel W. White, Registrar.
John James Sawyer, Sheriff of Halifax.
The Crier.
The Attorney-General and the Counsel and Solicitors practising in Chancery.

His Honour directed the commission for his appointment to the office of Master of the Rolls to be read, and this being read it was ordered to be entered in the minutes.

His Honour intimated to the bar that the Rolls Court would for the present, and until further order herein, be held regularly on the first and third Mondays of every month (except during the terms of the Supreme Court), and on such other days as should be particularly appointed. That the Court would sit in the Court House in the Province Building, which, with the approbation of the Chancellor, had been appointed by his Honour as most suitable for the public proceedings of the Court, and would be attended by the sheriff and other officers, and that gentleman of the bar would require to appear in professional costume."

One would infer from reading this order that the sittings of the Court of Chancery before Mr. Fairbanks's time had not been open to the public, or at least had not been held in the

Court House where the public could attend, and that gentlemen of the bar had been heard without being in proper dress. I should be inclined to draw the conclusion from this and other circumstances that in Mr. Robie's day Chancery proceedings were conducted in a loose and informal manner, which Mr. Fairbanks was determined to correct. I find a record in the Chancery Minute Book at p. 40 which is of some importance as showing that when the Chancellor presided in the Court after the Master of the Rolls was appointed, he was assisted by the common law Judges. The entry is as follows:

"THURSDAY AND FRIDAY 14TH & 15TH MAY, 1835.

Present—The Chancellor.
The Chief Justice.
Mr. Justice Hill,
Mr. Justice Bliss.

Cause: Gussie v. Miller.

This cause was heard on exceptions."

On the 19th May, 1835, is this entry, showing some friction between the Chancellor and the common law Judges:

"TUESDAY, MAY 19, 1838.

Court of Chancery opened.

Present—The Chancellor,
The Master of the Rolls,
Mr. Nutting and The Registrar.

The Chancellor directed the Registrar to address a note to the Chief Justice and other Judges to inquire if they meant to attend the Court this morning according to the adjournment made by the Chief Justice. His Excellency waiting for an answer, and the bar in attendance. After waiting until 12 o'clock, and the Judges not attending, his Excellency had a paper written by himself setting forth that he had attended and waited for an hour, and having had no intimation from them that they would not attend, he would adjourn the Court until to-morrow, Wednesday, at 12 o'clock."

On Wednesday 20th May, 1835, follows this entry: "The Court opened in the Council Chamber—Present, the Master of the Rolls and the Registrar.

Captain Campbell, A.D.C., delivered to his Honour a message from his Excellency stating that being engaged in Council he could not attend the Court and did not know when he could come down. His Honour then adjourned the Court until Monday next at 11 o'clock." Beyond these extracts, I have observed nothing of consequence to note in the Chancery proceedings during Mr. Fairbanks's period of office. There was evidently a large amount of the ordinary business transacted, as the minute book shows, and I have always understood that Mr. Fairbanks was an efficient and able Judge.

Samuel G. W. Archibald succeeded Fairbanks as Master of the Rolls on the 28th April, 1841, and held the office until his death in 1846. The fame of his eloquence as an orator, and the important part he played in the public affairs of Nova Scotia, are too well known to need any further reference on my part. His life was written years ago, in which all particulars have been given to the world. He had been one of the foremost lawyers in the Province, and enjoyed a large practice in the Court of Chancery, as the records disclose. As in the time of his predecesors, I find nothing of an interesting or remarkable character in the Chancery records during his term to make mention of. All the business of the Court seems to have been in the usual channel. It is unfortunate that no reported decision of our first three Masters of the Rolls remains, and except the decrees they made we have no material from which to form an opinion of their qualifications as Equity Judges. There are yet living persons who remember both Fairbanks and Archibald, and who speak of them both as men of high ability and integrity.

Mr. Longworth in his life of Mr. Archibald, at p. 156, makes the following reference to him as a Judge: "Mr. Archibald soon had an opportunity of displaying his judicial qualities in his new position. The sound common sense which distinguished his judgments, and which after all forms the foundation of law, and equity—the clearness and precision with which the principles underlying the case were announced and applied—gave a character to his decrees which was not generally expected on the part of the bar. Had he ascended the bench earlier in life, he would undoubtedly have

left behind him a reputation as a jurist not inferior to that of almost any of the distinguished men who have held office as Judges in Nova Scotia."

I have not been able to find the decisions or decrees to which Mr. Longworth alludes, but presume he makes the statement from the recollections of lawyers who knew and heard Mr. Archibald.

The fourth and last Master of the Rolls of this Province was Alexander Stewart, appointed on the 20th May, 1846, on the death of Mr. Archibald. Like his predecessor, he had taken a leading and distinguished part in the public affairs of this Province, and was regarded as a lawyer of eminent ability and learning and uprightness of character. To many of the present generation he was well known, and we are fortunate in having a few of his decisions reported, which bear testimony to the justice of the reputation he enjoyed as a Judge. He remained Master of the Rolls until the Court of Chancery was abolished in the year 1856. It was during his term of office that the agitation commenced which ultimately resulted in that important measure, and to which I will shortly turn my attention.

With this brief reference to the four Masters of the Rolls, I must pass on to other matters bearing on the constitution and proceedings of the Court. I have before mentioned that, with the exception of two Acts fixing the fees to be taken, no legislation affecting the Court was enacted until 1826, when the Act was passed providing a salary for the Master of the Rolls. I have also pointed out that the Chancellor ordinarily presided as sole Judge, with two or more Masters in Chancery as his assessors or advisers. The Masters, however, had no judicial authority. Their powers, as shewn by their commissions, were similar to those possessed by Masters in Chancery in England or Ireland at that time. On the appointment of a Master of the Rolls their assistance was no longer required, and from the records it is evident they did not sit with him. I observe, however, in some few cases where the Master of the Rolls was disqualified from interest or other cause, the senior Master in Chancery, at that time Mr. Nutting, sat as Judge and decided the matters coming

before him. In some other instances the Chancellor himself sat and heard the cases, assisted by the common law Judges. About the year 1832 great and growing dissatisfaction was aroused from the expense and delay in the Chancery Court. As a consequence, the statute 2 Wm. IV. ch. 42 was passed, entitled "An Act for appointing commissioners to inquire into and report upon the expediency of reforming the practice and proceedings in the Courts of Law and Equity." etc. The preamble, after reciting that whereas it has become necessary to revise the civil and criminal codes of this Province, and to render the practice of the Courts of Law and Equity more simple and less expensive, then proceeded to outline the appointment of five commissioners to deal with the subject and report to the Lieutenant-Governor.

Chapter 19 of 3 Wm. IV. was an Act passed for the more easy redemption and foreclosure of mortgages, but the results of the report more fully appear in ch. 52 of 3 Wm. IV., "An Act for amending the practice of the Court of Chancery and diminishing the expenses thereof."

Sec. 1 empowers and requires the Master of the Rolls and Chancellor from time to time to make such rules and course of practice as will reduce the great prolixity, expense, and delays of the proceedings, business, and pleadings under the present practice, as shall be deemed most expedient and effectual for the ease of the suitors therein.

Sec. 2 enacts that in all matters not regulated by the present practice, or the rules and orders to be made, the practice of the High Court of Chancery in England shall be followed until the same shall be changed under the Act.

Sec. 3 abolishes certain formal proceedings, etc.

Sec. 4 enables the Court of Chancery to use the same powers of execution to enforce its judgments and decrees as are in use in the Supreme Court.

Sec. 5 enables the Chancellor to establish a proper seal for the Court.

Sec. 6 enables the Master of the Rolls to sign all orders and decrees made by him, and in case of decrees makes the Chancellor's signature unnecessary when he is absent from Halifax, but provides that the enrolment of all decrees

be signed by the Chancellor. It further constitutes the Master of the Rolls the responsible adviser and Judge of the said Chancery Court.

Sec. 7 provides that a Master Extraordinary of said Court shall be commissioned and appointed in each county or district of the Province, and gives every such Master power to administer oaths in proceedings to be had in the Court and to act as an Examiner of said Court.

Sec. 8 validates all sales of real estate made under decrees of the Court, and empowers sales to be made by the Court in future.

Secs. 9 and 10 refer to matters not necessary to observe upon here.

Sec. 11 extends to the Court of Chancery the right to take evidence *de bene esse* as in the Supreme Court.

Sec. 12 enables the Court of Chancery to permit the examination of witnesses *viva voce* before the Court.

From a consideration of this statute it will be seen that a number of useful reforms were made. For the first time the Master of the Rolls is constituted by statute a Judge in Chancery with extended powers. It would seem that up to this time the Chancellor's signature was necessary to the validity of all rules and orders, but this is now dispensed with, and in decrees when he is absent from the Province. The process of the Court is simplified in respect to execution of decrees, and a settled mode of procedure ratified by statute, and I should think a very great improvement was made in allowing witnesses to be examined *viva voce* in Court. Hitherto the practice was to have them examined by means of interrogatories before examiners, which can never be as satisfactory as in open Court. I observe that Stewart signed all rules with the statutory title of Responsible Adviser and Judge of the Court of Chancery.

I have already adverted to the rules and orders which were passed and the great reforms eventually effected in the proceedings in Chancery under the authority of this statute.

One curious feature is brought out by the statute 5 Wm. IV. ch. 26, that the then Master of the Rolls, Mr. Fairbanks, was at the same time a member of the House

of Assembly. It was then provided that thereafter no person holding the office of the Master of the Rolls or Judge of the Court of Vice-Admiralty should be eligible to be elected, and further provision was made for Mr. Fairbanks to resign his seat. It strikes one as singular that a Judge should have been permitted to retain a seat in the Legislature, but I believe it is not without precedent in England, where the Master of the Rolls at one time sat in the House of Commons.

In 1848, chap. 21 of 11 Vic. was passed, making the Judges of the Supreme Court and Master of the Rolls independent of the Crown. It provides that, notwithstanding their commissions are only during pleasure, and that on the demise of her Majesty they would become vacant, they should hold their respective offices during good behaviour, and that they should not cease to hold them by reason of the death of the Sovereign. It further provides that in case of any vacancy it shall be lawful for the Governor, under the Great Seal of the Province, to appoint a fit and proper person until the Royal pleasure shall be known.

The statutes which I have mentioned comprise all the legislation touching the Court of Chancery until the final Act was passed in 1855 which swept it out of existence, and to the consideration of which I now turn.

The statute which completed the destruction of the Court of Chancery in this Province was passed in the session of 1855. It is chapter 23, entitled "An Act for abolishing the Court of Chancery and conferring Equity Jurisdiction on the Supreme Court."

Sec. 1 provides that "the Supreme Court shall have jurisdiction in all cases heretofore determinable by the Court of Chancery, and shall exercise the like powers and apply the same principles of equity as justice may require, and as have heretofore been administered in that Court."

Sec. 2 provides that the practice of the Supreme Court now or hereafter to be established as far as it is applicable thereto shall be observed, and in any case where the provisions of the practice and this Act shall not apply, the practive of the English Court of Chancery shall be adopted.

The remaining sections make further provisions respecting jurisdiction and procedure in the Supreme Court in equitable suits, provide a pension for the Master of the Rolls, the Hon. Alexander Stewart, and the Registrar; and the concluding section brings the Act into operation on 1st August, 1856.

Thus was brought to its end, after an existence of more than a century, the old Court of Chancery in the Province of Nova Scotia. Opinions have varied, and doubtless will always vary, as to the wisdom of this step. The passage of time—now nearly half a century—has greatly obscured some of the underlying causes which led to such a momentous change in our judicial procedure. It is doubtful if these will ever be perfectly understood, but from the newspaper discussions at the time, the reports made to the Legislature, and the debates in the House of Assembly, we can to some extent judge of the spirit and motives which influenced the Legislature.

The spirit of judicial reform was in the air, not only as regards the Court of Chancery, but also the Courts of the Province. On 1st February, 1849, the House of Assembly passed a resolution that a "committee be appointed to inquire into the general jurisprudence of the Province and practice of the Supreme Court, and to report to this House by bill, or otherwise." On this committee were Howe, Johnston, Young, Harrington, Henry, Marshall, and Creelman. Nothing appears to have resulted from the labours of this committee. On the 4th March, 1851, a resolution was passed to appoint a select committee to take into consideration the propriety of abolishing the Court of Chancery, on which were appointed Johnston, Marshall, Harrington, Young, Henry, Killam, and Fulton, and on the 28th March, 1851, Mr. Henry reported and presented a bill to abolish the Court of Chancery and to transfer Equity jurisdiction to the Supreme Court. This bill passed the lower House, but was thrown out by the Legislative Council. As a result of this, on the 7th April, 1851, Mr. Johnston moved that a commission be appointed to inquire into the practice and proceedings of the Courts of Law and Equity with a view of transfer of the Equity to the common law jurisdiction, if it

be practicable, and to prepare a bill. The commissioners appointed were Brenton Haliburton, C.J., Mr. Justice Bliss, J. B. Uniacke, and W. A. Henry. Their report is to be found in the House of Assembly Journals, 1852, Appendix No. 73. After reporting elaborately on the proposed changes in the practice of the Supreme Court, they make the following observations:

"Although the expediency of transferring the jurisdiction of the Court of Chancery to the Court of common law has been under our consideration, neither the time at our command, nor the materials and information within our reach, have been such as to enable the commissioners to arrive at any conclusion, and having perceived the question of Chancery reform has been submitted to the consideration of a commission in England, whose report has been submitted to Parliament, they have been influenced by a desire to avail themselves of the result of the investigation before coming to a conclusion on this difficult and important branch of their inquiries."

It will be interesting to call attention here to a fact which appears from correspondence published in the Journals of the House of 1852, that the bill for the abolition of the Court had been introduced, and passed the Assembly without even giving notice to the Master of the Rolls of such intention, apart from the still more remarkable fact that no report or investigation on the subject had been laid before the House. This is noted here as indicative of the spirit which must have inspired the governing parties in the Legislature in respect to the Court, and the Master of the Rolls.

Their final reports on the abolition of the Court of Chancery will be found in the Assembly Journals, 1853, Appendix No. 16. The commissioners were unable to agree on any report and were requested to submit their individual views. Only three did so. Mr. Young gave his own views, and whatever may be our opinion on the question, a perusal of this paper does not show that profound and practical knowledge which we should expect from a legislator and lawyer of his experience. On the other hand, the views of the chief Justice and Judge Bliss display the result of long experience and thorough acquaintance with the whole subject, expressed

in vigorous and clear language. While Mr. Young in strong terms contended for the suppression of the Court, the Chief Justice and Judge Bliss pointed out the erroneous theory on which those who desired it abolished were building, and exposed the failure to which it was doomed, and the very mischiefs which afterwards followed. The ablest defence, however, made for the Court was by the Master of the Rolls himself. This defence is not to be found in the Journals of the Assembly, although it was in the form of a letter addressed to the commissioners, and he requested its publication with their report. Why it should have been excluded does not appear, but Stewart took care to have it recorded in the record books of the Court. It is too long to be reproduced here, but some of the points deserve notice. The principal grounds urged for the abolition of the Court are no doubt fully expressed in Mr. Young's speech introducing the bill in the session of 1855. "The great objection," says Mr. Young, "to the Chancery as now constituted is that its forms, delays, and expensive machinery exclude a vast amount of business which ought to be adjudicated on by it."

The answer to these charges in Stewart's letter to the commissioners is very decisive and the facts in support strong. He points to the great reforms and changes which had been made within recent years, simplifying the practice, and lopping off many useless forms in the conduct of the proceedings. In this both the Chief Justice and Judge Bliss corroborate his statements in their reports. As to delays, he significantly calls their attention to the fact that not one cause remained in his Court undisposed of which had been heard before him. In respect to expenses, while giving figures to show that they are not large in comparison with other Courts, he at the same time reminds them that the scale of costs and fees to be taken are fixed by the Legislature, and not by him. After explaining at some length the objections to the proposed transfer of the Chancery business to the common law Courts, he challenges those who are making and repeating the charges against the Court to come forward with proof of them. This was never done. On 30th March, 1853, a resolution was passed requesting the Lieutenant-Governor to appoint a commission of suitable persons to prepare a bill for the abolition of the Court of

Chancery. The Act was founded on that report to which I have above referred, and which with the letter of the Master of the Rolls will be found published in extenso in a pamphlet embracing all the papers on the history of this Court in Nova Scotia.

Now, apart from the action of the House of Assembly which I have briefly summarized, it is plain to those who read the speeches and newspapers of the day that other motives contributed to the result. Stewart was a man of strong and independent character, and in the course of his political career had aroused the bitter enmity of his opponents, and had also incurred the ill-will of some of his former colleagues. Among them were the most prominent lawyers of the time on both sides of politics. In striking a blow at the Court, they were striking a blow at him, and to some extent at least it would seem that the Court owed its extinction to the dislike felt towards the head of it. This offers the best explanation of the unanimity with which all parties acted. Whether on the whole a mistake was committed in abolishing the Court of Chancery or not, is fairly open to argument. Looking at the question in the light of experience, I come to the conclusion that the administration of law and equity by one tribunal is best, and most conducive to the interests of suitors, and in so far as that was the object of the Legislature it was wise. This object, however, was not accomplished except in name, for our legislators of that day had not grasped the basis on which the fusion of law and equity could be brought about. Indeed, it was not successfully accomplished in England for many years after, and then only after most patient and searching investigation by the greatest legal minds in the country. What it did effect was a serious muddle in the administration of justice, and its result was most injurious in its effects on the legal profession. It is easy to destroy an old existing institution, but it takes time and men of genius, knowledge, and experience to reconstruct. The best evidence of the mistake then committed was that in the very short period of eight years the Legislature found it necessary in the public interests to re-establish the same Court under another name—the Court of Equity—to the Judge of which all equitable business was again exclusively assigned. Great injury was brought upon

the legal profession by the abolition of the Court of Chancery, in leading to the neglect of the study of equity jurisprudence. The lawyers of the succeeding generation, and until the Judicature Act was brought in, devoted their energies almost entirely to the common law; not realizing the necessity, they rarely acquired any thorough knowledge of equity principles and procedure. Equity as administered in the Court of law — at least up to the time the late Mr. Justice Ritchie became Equity Judge—was not remarkable for its depth and learning and adherence to sound principles, and there was little encouragement to pursue it.

Happily, this defect in our Provincial bar has been removed, and we have able and experienced equity lawyers practising in our Courts, capable of holding a first place in any Court in the British dominions. The rising generation of lawyers are now taught and imbued with a general knowledge of equity jurisprudence without which it would now be impossible to follow their profession.

Although not immediately bearing on my subject, it may be interesting in conclusion to state that by chap. 10 of the Acts of 1864, the Court of Chancery under the name of the Court of Equity was re-established, using the procedure of the Supreme Court as far as applicable, but it was found necessary largely to amend this to adapt it to equitable proceedings. That distinguished lawyer and legislator, the Hon. James W. Johnston, was appointed to the office of Equity Judge, and at his death he was succeeded by the eminent and well-known Judge, John W. Ritchie. On his death he was succeeded by Alexander James, who was then a Judge of the Supreme Court. During his time the Equity Court as a distinct tribunal was again abolished in 1884, when the Judicature Act came into operation. The fusion of law and equity was then in reality accomplished, and both are now administered by all the Judges of the Supreme Court. The title is still retained by Mr. Justice Graham, who, as such, has jurisdiction in the Court of Marriage and Divorce, but in other respects his position is the same as the other Judges.

This completes the history of three of our principal Courts of Judicature, that is to say, the Supreme Court, the

Inferior Court of Common Pleas, and the Court of Chancery. There remains to be written the history of the Court of Vice-Admiralty—which from all I have observed will form a very interesting chapter in our judicial annals — the Court of Probate, the Court of Marriage and Divorce, the Court of Error and Appeal, and the Court of Escheats. My object in placing the history of these tribunals before the public has been to rescue from oblivion many interesting and important facts, scattered around in our Court and Provincial records, not easily, or at least not readily, attainable by those desiring to know something about them. It has always appeared to me that at least members of the legal profession should possess this knowledge, and that it should not be altogether uninteresting to the general public.

The particulars I have given, it is to be understood, are by no means exhaustive of the subject, and for those who desire more extended information I would refer them to the Chancery and Provincial records from which I have gathered these fragments.

CHARLES J. TOWNSHEND.

HALIFAX.

EDITORIAL REVIEW.

The Law Times Annual Digest.

Hitherto our annual digest has been modestly referred to as an Index-Digest, but in the future it will be a full and complete digest of the case law of the Dominion and Provinces. The method hitherto adopted, of signifying the effect of a decision by a system of amplified head-lines or catch-words, has its merits, and, when used in connection with the OCCASIONAL NOTES, it was almost, if not quite, as useful as a fuller digest. We propose, however, in the future, beginning at the end of the present year, to make a departure. It will not be forgotten that in very many instances the advance note of a case published in the OCCASIONAL NOTES is in fact a digest of the case, and is used as such in the digests at the end of volumes and in general digests. We have shrunk hitherto, on account of the great expense, from re-arranging and reprinting our advance notes at the end of the year in the form of a digest, but now, in order that lawyers may have a more entirely satisfactory annual digest, we are undertaking this additional expense, and intend to give the readers of the LAW TIMES, early in 1901, a full and complete digest of all the case law of the Dominion and Provinces (including Quebec) which is published during 1900 in the OCCASIONAL NOTES, and in the regular reports. This new digest will be very carefully prepared and edited, and will be complete in itself and available for separate use. In many cases the note from the OCCASIONAL NOTES will be simply reprinted under the appropriate title and sub-title with a reference to the page, and also to the page of the volume of the regular reports where it will be found; but in cases where an advance note is not printed, and in other cases calling for it, a special digest-note will be prepared by competent hands and placed under its proper heading. The result will be such a complete annual digest as has never before been published in Canada, which will be invaluable to lawyers.

Lawyers as Politicians.

The lawyer who spends his days in Court or in his office is a very different being from the one who has or aspires to have a seat in Parliament or the Legislative Assembly. As a rule in this country the lawyer-politician is not often to be found in Court, for the reason that politics take up his time and ruin his business. There are, of course, exceptions to the rule, instances of men who maintain at the same time a foremost place at the bar and in the legislature, and of such it may well be believed that they carry something of the courtesy and decorum which usually prevail in Courts of justice into the other arena. In the smaller towns in Ontario a lawyer is expected to take some part in politics, on one side or the other. But in the larger places a majority of the members of the bar are by no means keen politicians, and indeed it might puzzle some of them to define their political faith. But, even with strong political leanings, lawyers are not usually men who take the views that their opponents are all wicked and their allies all virtuous. Remarks made recently in the Ontario legislature, however, would lead one to suppose that that rather childish doctrine is not obsolete. A member is reported to have expressed incredulity as to a Queen's counsel, representing the Ontario Government before commissioners upon a public inquiry, acting fairly in the discharge of his duty as counsel, which might require him to bring out evidence damaging to his political friends. This pointed reflection upon the character and conduct of a brother barrister was not supported by even a suggestion of bad reputation or previous unfair or unprofessional conduct. On the contrary, the member seemed to think that it was quite sufficient to mention the politics of the counsel to establish the proposition that he might be expected to act unfairly in his professional capacity—for it is not to be supposed that before a commission of Judges he was to act otherwise than in a professional capacity. Is this a lawyer-politician's own candid opinion of how any one of that class would act in the like circumstances, or does he cling to the puerile superstition indicated, that all the sheep are on one side of politics and all the goats on the other? The same legislator considered it indecent in

the Government to appoint an eminent Queen's counsel as a member of a commission to inquire into the finances of the Province, because this gentleman is an officer of the Court, owing his appointment, or the continuance of his appointment, in some sense, to the Government. These remarks made in the Legislative Assembly, reflecting as they do upon the honour of members of the bar, come with the force of a shock to those who are not in close touch with politics and politicians. We think that members of the bar generally, without regard to politics, will regret that such remarks have been made even in the heat of debate.

Changes on The County Court Bench.

We record with regret the death of Mr. E. J. Senkler, Judge of the County Court of Lincoln, who deservedly enjoyed a very high reputation as a lawyer and jurist. We note also the retirement of Mr. J. F. Pringle, Judge of the County Court of Stormont, Dundas, and Glengarry, after many years of able and faithful service, and the appointment of Mr. J. R. O'Reilly, Q.C., of Prescott, in his stead. The junior Judge of the same County Court, Mr. R. B. Carman, has been transferred to Lincoln in the room of Judge Senkler, and Mr. Neil McCrimmon, of Toronto, has been appointed senior Judge of the County Court of Ontario in the place of Judge Dartnell, deceased. This county has now three Judges, a senior and a junior County Judge, and a Surrogate. Mr. J. J. Kingsmill, also recently deceased, was formerly Judge of the County Court of Bruce. We are glad to see that the rule of taking Judges from outside of the jurisdiction of their Courts has been followed in all these appointments.

York Law Association Library.

At a special meeting of the County of York Law Association recently held, a report of the board of trustees recommending the removal of the library to the new municipal buildings in the City of Toronto, was adopted. At the annual meeting a resolution had been passed expressing the opinion that it would be better, if possible, to retain, the library in the lower part of the city. The report of the

trustees now adopted shews that it is practically impossible to do so—the association being dependent for half at least of its income upon the annual grant of $800 made to it by the Law Society of Upper Canada, which body refuses its consent to the library being retained in the lower part of the city, deeming it "of first importance that the books of the library should be accessible at all times for the use of the Courts."

There is no doubt that it would be a vastly convenient thing to keep the library where it is now, in the old court house, or in that neighbourhood—convenient, that is, to a large majority of the lawyers of the city of Toronto, whose offices are situated in that quarter of the town, and who have for the last dozen years enjoyed the advantage of an emergency library, and a very good library, at their elbows. The new city buildings are in another quarter, and these gentlemen say that they may as well go to Osgoode Hall as to the York library, if it is to have its habitation in the local court house. We hope, however, that there will be no general withdrawal of members of the association when the library is moved, as it must be shortly. It will be better for many gentlemen who are not weightily anchored to the east of Yonge street to transfer their habitations northward and westward, and those who cannot will still find the library useful when they are engaged in the Courts held at the new buildings. Also, we think the argument that "you may as well go to Osgoode Hall," is not quite sound. There are certain advantages about a small library which will lead many to the new city buildings rather than to Osgoode Hall when they wish to look up a point or go through a line of cases.

Besides the refusal of the Law Society, there are many good reasons why the library cannot be maintained by the association in the neighbourhood where it now is after the removal of the local Courts, and these are set out in the report of the association which, as we have said, was adopted by the meeting.

The American Bar Association.

The transactions of the Twenty-second Annual Meeting of the American Bar Association, which was held in Buffalo,

New York, at the end of August, 1899, were reported verbatim, and now appear printed in a neat volume (Dando Printing and Publishing Company, Philadelphia).

The president, the Hon. Joseph H. Choate, was not able to be present, but sent a letter in which he recommended to the association the study of comparative legislation, the development of professional education, and earnest attention to the law's delays, which, he said, seemed to be constantly on the increase, and a large proportion of which he thought attributable to the inevitable tendency to elaborate procedure and unnecessarily multiplied appeals.

Every year the association appoints a committee of five upon each of the following subjects, which committee reports at the next meeting: Jurisprudence and Law Reform, Judicial Administration and Remedial Procedure, Legal Education and Admission to the Bar, Commercial Law, International Law, Publications, Grievances, Law Reporting and Digesting, and Patent, Trade-mark, and Copyright Law.

State Punishment of Crime.

Mr. Justice Kennedy's paper on this subject was the principal one read before the association. The leading suggestion was that, although "both reformation and prevention are principles which, in regard alike to mode and extent of punishment, properly have an important place in the consideration of the statesman who frames penal legislation and of the Judge when he is meting out punishment, yet the root idea, the governing principle, is the fitness of suffering to sin—the relation which ought to exist between wickedness and pain."

Law Reporting.

The report of the Committee on Law Reporting and Digesting contains some excellent suggestions, such as this: "It would be a relief to the profession if Judges would refrain from writing long discussions of questions of law that are well settled, and from making long quotations from former opinions and numerous citations in support of conclusions on which there is no difference of opinion, and that

Judges and reporters should agree in excluding from the reports long opinions on mere questions of fact, and from reporting in full opinions which declare principles of law that are already fully established." And this on a minor matter, but one which troubles us in Canada very much: "An important improvement in reporting is suggested by a recent rule of the Court of Errors of New Jersey, which provides that cases on appeal shall retain the title of the case below without reversing the order of the names."

Legal Education Section.

In this department Mr. Hoyles's paper on "Legal Education in Canada," published in this journal last year, was the first read, and is said to have been highly commended. It was followed by an instructive interchange of opinions on Moot Courts. There was also a discussion on "State Boards of Law Examiners." Papers followed on "The Teaching of the Law in France," by Mr. Thomas Barclay, and on "The Early History of Legal Studies in England," by Mr. Joseph Walton, Q.C.

BOOK REVIEWS.

Stone's Justices' Manual, being the yearly Justices' Practice for 1900: A guide to the ordinary duties of a Justice of the Peace, with Table of Statutes, Table of Cases, Appendix of Forms, and Table of Punishments; 32nd edition, edited by George B. Kennett. London: Shaw & Sons, Fetter Lane & Crane Court, E. C.; Butterworth & Co., 12 Bell Yard, W. C. 1900.

The editor has very carefully revised and corrected this manual, and incorporated therein the statutes affecting Justices passed in the last session of Parliament, and a very large number of decisions given since the publication of the 31st edition.

The Law of Mines and Minerals, with an appendix of Mining Precedents, fully annotated with references to the text, and a glossary of English Mining terms, by the late William Bainbridge; 5th ed., by Archibald Brown. London: Butterworth & Co.

For upwards of a quarter of a century "Bainbridge on Mines" has been regarded as a standard authority on the interesting and somewhat intricate law of mines and minerals. William Bainbridge, F. R. S., the author, now deceased, lived to edit the 3rd edition published about July, 1867. The 4th edition, published in January, 1878, and the 5th edition (1900), now under review, have been edited by Mr. Archibald Brown, of the Middle Temple, whose long experience with mining law is eminently calculated to qualify him for the performance of his task. Mr. Brown's statement in the preface that he has "preserved all that was good in the old Bainbridge, reducing it in compass and otherwise modifying it as required," appears to be a questionable statement of the result of his labours. The restatement of the authorities more concisely and practically

than in former editions is a meritorious feature of the work, although on a careful perusal of the text one remarks the absence of some familiar authorities on the subject, many of which should have been dealt with and all of which one would have expected to find referred to. Among these may be mentioned Attorney-General v. Chambers (*a*); Attorney-General v. Hanmer (*b*); Fothergill v. Phillips (*c*); Port v. Turton (*d*); Watson v. Eales (*e*)—all of which were dealt with or referred to in the 4th edition, but for some unexplained reason are not included in this edition—Attorney-General v. Ewelme Hospital Co. (*f*); Bankart v. Houghton (*g*); Brown v. Chadwick (*h*); Dixon v. White (*i*); In re Haven Gold Mining Co. (*j*); Henderson v. Eason (*k*); Hodgson v. Moulson (*l*); Love v. Bell (*m*); Midland Railway Co. v. Miles (*n*); Phillips v. Homfray (*o*); Plant v. Stott (*p*); Re Roundwood Colliery Co. (*q*); Shaftesbury v. Wallace (*r*); Taylor v. Mostyn (*s*); Wright v. Horton (*t*), disapproving of Re Native Iron Co. (*u*); and Young v. Bankier (*v*).

The addenda, too, contain instructions to add, as note references, a number of authorities, cases decided and reported while the work was in progress, and likewise a considerable number of important cases for which such an

(*a*) 4 DeG. M. & G. 206.
(*b*) 27 L. J. Ch. 837.
(*c*) L. R. 6 Ch. 770.
(*d*) 2 Wils. 169.
(*e*) 23 Beav. 294.
(*f*) 17 Beav. 366.
(*g*) 27 Beav. 425.
(*h*) 7 Ir. C. L. 101.
(*i*) 8 App. Cas. 833.
(*j*) 20 Ch. D. 151.
(*k*) 17 Q. B. 701.
(*l*) 18 C. B. N. S. 332.
(*m*) 9 App. Cas. 286.
(*n*) 30 Ch. D. 640; 33 Ch. D. 632.
(*o*) 11 App. Cas. 466.
(*p*) 21 L. T. N. S. 106.
(*q*) [1897] 1 Ch. 373.
(*r*) [1897] 1 Ir. R. 381.
(*s*) 33 Ch. D. 226.
(*t*) 12 App. Cas. 371.
(*u*) 2 Ch. D. 345.
(*v*) [1893] A. C. 691.

excuse is inapplicable, some of the cases being authorities of from a quarter to half a century's standing, for instance:—Attorney-General v. Tomline (*w*); Hamer v. Knowles (*x*); James v. Cochrane (*y*); Lamb v. Walker (*z*); and Williams v. Bagnall (*a*).

The table of contents is exceedingly well arranged and affords a ready summary to the contents of each chapter. The comparatively recent style of adding the dates of the decisions referred to as authorities has been adopted, and is of much practical advantage to the reader.

The index, which is somewhat ostentatiously stated to have been "constructed with a paramount view to practitioners consulting the treatise," is decidedly meagre, inadequately cross-referenced, and in fact inferior to that of the 4th edition.

The letter press is excellent and a credit to the publishers.

The great dissimilarity between the statutory provisions relating to mines and mining in Great Britain, when compared with those of Canada, and the Provinces thereof, none of which are mentioned or dealt with, and the entire absence of Canadian and Australian cases, except such as have reached the Privy Council, will go far to limit the utility of the work to Canadian practitioners.

(*w*) (1877) 5 Ch. D. 574.
(*x*) (1861) 6 H. & M. 455.
(*y*) (1853) 8 Exch. 556.
(*z*) (1878) 3 Q. B. D. 389.
(*a*) (1867) 15 W. R. 272.

THE

CANADIAN LAW TIMES.

MAY, 1900.

THE ANCIENT BREHON LAWS OF IRELAND.

IT is to the combined results of the antiquarian industry of a Welshman, the zealous enthusiasm of an Englishman, the wise forethought of an Irishman, and the generous liberality of a Scotsman, that we owe the preservation to the present day, of three of the most important existing manuscripts of the ancient Brehon Laws, under which Ireland was governed for upwards of 1,200 years. For many years after the English gained a foothold in Ireland, it was a criminal offence to be found in possession of a document written in the Irish language. All sorts of devices were resorted to, for the purpose of concealing them, but the greater number were discovered, and burned or destroyed by the English soldiery.

About the year 1700 Edward Lhwyd, the eminent Welsh scholar, made a tour through Ireland, and he there obtained, in various parts of the country, about 20 to 30 old parchment manuscripts, amongst which were the three precious ones above mentioned. These manuscripts subsequently became part of the Chandos collection, and later they came into the hands of Sir John Seabright, a Scotsman. About the year 1778. Colonel Vallancey, an Englishman, was sent by the Government to superintend some works in Cork. He had previously spent many years in India, and was a distinguished Oriental scholar. Being struck with the similarity between certain words in Irish and Hindustani, he began to study the Irish language, in which he soon became very proficient. In 1782 he obtained permission from Sir

John Seabright to inspect the manuscripts in his possession, and he subsequently published a translation of some parts of them. In 1783 he wrote to Edmund Burke, pointing out the national importance to Ireland of these manuscripts, and the desirability of their restoration to Irish custody. Burke fortunately prevailed on Sir John Seabright, in August of that year, to present the manuscripts to the library of Trinity College, Dublin. There they remained for nearly 70 years, unnoticed and almost forgotten, except by O'Reilly, who refers to them in his essay on the "Ancient Institutes of Ireland," published in 1824. In 1852 a commission was appointed by the Government to superintend the transcription and translation of these manuscripts, as well as other ancient Irish manuscripts in the possession of the Royal Irish Academy, the British Museum, and the Bodleian Library at Oxford. The commissioners employed the eminent Irish scholars, Dr. O'Donovan and Professor O'Curry, to do the work. Both these gentlemen died while engaged on it, and Dr. Neilson Hancock, Dr. O'Mahony, and Dr. Alexander Richey completed the work. Some idea of the difficulty of the task may be had when it is known that the text was in a dialect which had become obsolete centuries before, and that the best Irish dictionaries then in existence did not enable one to understand the language, which was in fact entirely unintelligible to one who knew only the modern Irish. By dint of laborious study, repeated transcriptions, translations, comparisons, and revisions, the entire manuscripts were rendered into English, with the exception of a few technical law words, for which no adequate translations have yet been found. The result is embodied in four large volumes, which were printed at the expense of the Government. The first volume was published in 1865, the second in 1869, the third in 1873, and the fourth and final volume in 1879. These volumes contain, on one page, the ancient Irish text, with the explanatory notes and comments of subsequent annotators, in the same language, and on the opposite page the English translations of text and notes. They have thus made the whole subject of the ancient Irish laws accessible to the interested student. The only thing lacking is an appendix giving the pronunciation of the names of persons and places which occur in the books, as, without this,

one not familiar with old Irish names can never be sure of getting them exactly right.

Before discussing these laws themselves, let us first briefly consider their origin, duration, and abolition. Long before the arrival of St. Patrick in Ireland in the year 432, and probably before the Christian era, the Brehon law was in force in that country. So far as known, it had not been reduced to writing, but was rhymed and committed to memory, and thus handed down from one generation of Brehons to another. The introduction of Christianity necessitated many modifications, and these changes were effected by nine men appointed for that purpose by a special assembly convened by St. Patrick. Three of these were bishops, including St. Patrick himself, three more were kings, including Laoghaire, the "Ard Righ," or high king, and the remaining three were Brehons, one of whom was especially skilled in the then ancient dialect of the country, in which these laws had been preserved. Their labours extended over the years 438 to 441, and all the previous Brehon laws were examined and revised. Many were rejected as obsolete, or as pertaining to Pagan rites, or as unsuited to the altered conditions of the people. The remainder, with emendations, were finally embodied into the Senchus Mor, or Great Book of Irish Law, which neither bishop, king, nor Brehon ever afterwards attempted to alter. The Senchus Mor does not however appear to have entirely covered what would now be called the criminal law, as that is principally contained in the "Book of Aicill" mentioned hereafter.

The "Ard Righ" had attached to his Court a council of Chief Brehons or Judges, who settled all matters within the central province, and decided on the obligations of the four provincial kings to the "Ard Righ," as well as their mutual obligations to each other. Each provincial king had also his circle of Brehons, but of lower rank than those of the "Ard Righ," to decide all matters within their respective territories. Finally, each chief had one or more Brehons attached to his household, to decide the quarrels of his tribe. The office of Brehon was, by custom, hereditary in certain families, but a Brehon, as such, had no exclusive jurisdiction

in any specified district. His position was that of a professional lawyer, consulted by his clients and paid for his opinion. Brehons who attained great fame as arbitrators acquired wealth in the exercise of their profession. There were several law schools at which the younger Brehons were instructed in their business. In the absence of printed books, and the great scarcity of written ones, the education naturally was, first, the committing to memory of the customs of the locality, and afterwards applying them in imaginary cases, suggested by the teachers.

The Brehon had no legislative power, and was under no obligation to improve the law. He had no knowledge of any other system, and could not, therefore see the imperfections in his own. Students were then, as now, more desirous of acquiring practical information of immediate value to themselves, than to learn the general principles from which the practical rules were derived. It thus resulted that in the great body of the Brehon law there is no exposition of the general principles of the law, but only a mass of particular rules. The consequence is that the modern reader often finds himself unable to obtain any general view of the system, or to grasp the general principles that are usually taken for granted in the discussion. The only period during which the laws of the Senchus Mor were acknowledged over the whole of Ireland was from its compilation until the invasion of Ireland by the Pagan Danes in 792. This was the golden age for Ireland. After 300 years of fighting, first with Danes, and afterwards with Normans, the latter, in the end of the 12th century, introduced their feudal system, which, finally, in the 17th century, entirely supplanted the Brehon law. There was much resemblance between the Brehon laws and those of ancient Britain, and it is in fact asserted on good authority that King Alfred the Great borrowed a great many of his laws from Ireland. These laws were also transferred to Scotland, but were early modified by the feudal system, whereas in Ireland they retained all their native purity, until they were supplanted by English law.

Though the Brehon law was declared by a statute passed in Kilkenny in 1367 to be (amongst other things) "wicked

and damnable," yet down to the reign of Elizabeth it continued to be as emplicitly obeyed in Ireland, outside of the English pale, as it had been in the fifth century. The surrender of Kinsale and the fall of the Castle of Dunboy in 1602, however, paved the way for its final overthrow. In the year 1612, the ninth year of the reign of James I., the common law of England became the jurisprudence of the sister island, and the English Judges held their first assize circuit throughout the whole of Ireland. There is reason to believe, however, that, before that time, and even before the landing of Strongbow, the Irish themselves had become sensible of the deficiencies of their primitive system of legislation to meet the requirements of the changed condition of affairs. There is certainly evidence to show that several Irish chieftains, from the reign of Edward III. to that of Henry VIII., declared their desire to be governed by English laws. It was not, however, the desire of those responsible for the Government of Ireland to extend the protection of these laws to the "Irishrie." The reason was obvious, because to rob a "mere Irishman" was not then theft, and to kill him was no murder, but merely punishable by a petty fine. It is no wonder, therefore, that the Irish clung so tenaciously to their Brehon laws, because they found no protection under the English substitutes.

With this brief but necessary introduction, we shall now proceed to consider the principal features and provisions of the Brehon laws. The four published volumes already spoken of contain the Senchus Mor, the Book of Aicill, and certain miscellaneous law tracts. The first portion of the Senchus Mor deals with the law of distress, which appears to have been the universal remedy by which rights were vindicated and wrongs were redressed. There were no regular courts of law before which a creditor could summon an unwilling debtor. The creditor, therefore, first gave notice to the debtor of his claim, and if this was not settled, he proceeded to distrain the cattle of the debtor. The chief wealth of the country consisted in horses, cattle, sheep, and pigs. The law required that in distraining cattle that were not in a cow house, a stone was to be thrown over them three times before witnesses, to indicate that they were seized. If

satisfaction was not given within a certain time, or a pledge to proceed to arbitration, the creditor, accompanied by his law agent and witnesses, removed the cattle so distrained, and put them in a pound. He then served notice on the debtor, and the distrained cattle became forfeited gradually, so much a day, to the creditor, until the debt and costs were paid. If it was found that enough had not been seized, a second seizure was made and the same process gone through. The debtor could, by giving a sufficient pledge that he would have the dispute legally tried, obtain his cattle back. If he afterwards refused to carry out his promise, the pledge was forfeited for the debt. This procedure applied to a dispute between men of the same grade, but where the debtor was a person of chieftain grade, it was necessary, before making the distress, not only to serve the notice, but also to "fast on him," as it was called. This remarkable process points very strongly to the Hindu origin of the Brehon laws, as a similar practice still exists in India, or did until recently, when it was prohibited by the Government. It consisted in sitting at the door of the debtor and abstaining from food until he consented to refer the dispute to a Brehon. The spectacle of a hungry and clamorous creditor (who, though he was not allowed to eat, was allowed to talk,) sitting at a chieftain's door and proclaiming his wrongs to the passer by, would be such a disgrace, that it would soon wring the necessary consent from the debtor to have the claim adjudicated upon. It is solemnly declared in the Senchus Mor that "he who does not give a pledge to fasting is an evader of all," and "the judgment on him is that he pay double the thing for which he fasted upon." When the consent was obtained, the parties would thereupon proceed to a Brehon, who, after hearing the evidence, would give judgment according to the merits of the case, and the unsuccessful party would be ordered to pay the costs.

Specific and detailed provisions were made as to the different kinds of distress, the modes of taking and of keeping same, the limitations as to taking a distress, and the cases of exemption from distress. The property distrained was to be brought into a strong place for safe keeping, and the law

gave minute directions as to the penalty in case of any accident happening to the cattle while under seizure. Strict provisions existed for punishing every illegal act in connection with a distress, whether committed through ignorance, difficulty, or carelessness. Appropriate fines were appointed for the different acts of illegality, and the expenses of feeding and tending the cattle when impounded were to be paid out of the proceeds of the goods seized. A stranger or a landless man could not act as a law agent, and there were also restrictions as to the selection of advocates.

A debtor who had no property to be seized could be arrested after one day's notice, unless he gave security that he would remain and have his case tried, and that he would pay the debt if adjudged to do so. If he tried to escape, he might be arrested anywhere outside of the territory where he resided, and if he had no residence, he might be arrested anywhere. Kings and bishops were the only persons exempt from distress.

Growing out of this system of procedure arose the law of hostage sureties, caused by the division of Ireland into a number of distinct provincial kingdoms and sub-kingdoms. The former corresponded practically with the four provinces as they exist to-day, and the sub-kingdoms were somewhat similar to the modern baronies. When the plaintiff belonged to one of the sub-kingdoms and the defendant to another, a different system of sureties had to be adopted. The hostage surety of the defendant was one from whom a plaintiff was bound to accept pledges, and whom he might sue if the defendant absconded.

One of the principal features of Irish society was the prevalence of fosterage, that is, placing the children in the charge of other members of the tribe during their early years. Fosterage was either "for affection," in which case the foster parents received no remuneration, or "for payment," in which the terms were regulated according to the rank of the contracting parties. The kind of food, clothing, and education to be supplied to the different ranks of foster children were all minutely regulated by law. The period of fosterage terminated when the young people arrived at a marriageable age, which was 14 for girls, and 17 for boys.

The foster father was liable for all wrongs committed by his foster children and for any injuries which they sustained while under his charge. On the other hand, the children were obliged to support their foster father in his old age, in case his own children were dead or unable to support him. Naturally, however, less was expected from girls than from boys in this respect. This law of fosterage was also prevalent among the Anglo-Saxons, the Welsh, and the Scandinavians.

As regards land tenure, the most important characteristic was that each occupier of land belonged to a tribe, and was liable, in common with the other members, to certain tribal obligations. The land was, to a certain extent, common tribal property, and he was bound to offer his interest in it for sale to a member of the tribe before selling it to an outsider. The chieftainship of the tribe was an office like that of a president of a republic, and not like that of an hereditary monarch. The chief's claim for rent was not for the use of the land, as in England, but for stock supplied by him to the occupiers of the land. This system is said to have originated in the states and colonies of ancient Rome, to have been common in France till the time of the Revolution in 1789, and to still continue in the north of Italy. The Norman chiefs, who had been familiar with this tenure in France, readily adopted it upon their settling in Ireland, notwithstanding the English laws against it. The rent was paid by doing manual labor or rendering military service. The law contained very careful provisions for guarding against arbitrary termination, by either the chief or the tenant, of this tenure, when it was once entered into, and each party was protected against the wilful neglect of the other. When the English law was finally established in Ireland, the tenants were deprived of their joint ownership of the land, and to this is mainly attributable all the subsequent trouble and misery over the land question in Ireland, which has continued even to our day.

The question of social connections formed an important part of the law. The connections mentioned are eight in number, the two most important of which are those between a chief and his tenants, and those between the church and

her tenants. The duty of the church towards the tenants of its lands was described as "preaching and offering and requiem for souls, and the receiving of every son for instruction." From the tenants were due tithes, first fruits, and alms. The other matters dealt with under this head are the relations between different members of the family.

The remaining part of the Senchus Mor is known as "The Corus Bescna," and relates to contracts and obligations. These are divided into, first, those created by the actual agreement of the parties, and, second, those which arose from the social position of the parties, independent of any actual agreement. Under the first head are treated such things as the sale and purchase of goods and chattels, and under the second the reciprocal rights of the chief and the tribe, and the church and the people. The latter regulations were practically new, having been rendered necessary by the introduction of Christianity, and were therefore known as "the law of the letter," on account of their having been first promulgated at the same time as writing was introduced into the country. In addition to tithes and first fruits already mentioned, the church was also entitled by this law to "firstlings," that is, every first male animal, but it is very doubtful whether these rights were ever insisted upon. These rules had no connection with ordinary canon law, but were local regulations between the national church and its members. In other countries the early missionaries introduced Christianity and Roman law at the same time, but in Ireland the organization of the church appears to have been developed more according to local ideas.

Having now completed our brief review of the Senchus Mor, we shall turn our attention to the Book of Aicill. This book, which is contained in the third volume, deals with the criminal law, and professes to be a compilation of the opinions of King Cormac Mac Art, who reigned in Ireland about 200 years before the time of St. Patrick, and whose opinions were revised and brought into their present form by Cennfaeladth the Learned, about the year 650. It may be well, before remarking on this ancient criminal code, to explain that no distinction was made between what are known as torts or private wrongs on the one hand, and

crimes or public wrongs on the other. The King or his ministers did not undertake to punish any criminal act, even murder, but left it to the person injured, or his family or tribe, to exact compensation in the same way as for an ordinary act of trespass. If satisfaction was not duly given, the offender was compelled to arbitrate before a Brehon, in much the same way as for an ordinary debt. If he refused or was unable to pay the amount awarded, his kinsmen were obliged to do so, or to deliver him up to the aggrieved parties, who were entitled to wreak their vengeance on him, even to the extent of putting him to death. If he abandoned his tribe, he became an outlaw, and might be killed by those who were aggrieved. The amount of payment to be made necessarily varied according to the rank of the injured person and his family, and the nature and extent of the injury. This involved a very complicated system of pecuniary compensation, every detail of which was provided for in the work under consideration. The great body of the work consists of statements of the mode in which wrongs were to be described, and forms or precedents to be followed in calculating the damages to be awarded. Where the wrong was the act of more than one person, or was committed against more than one, the apportionment of the amounts to be paid and received was still more complicated. There being no metallic currency then in Ireland, the fine was calculated in "cumhals," which were the conventional units of value, a "cumhal" being equivalent to the value of three cows. Where the damages exceeded three "cumhals," the payment was to be made in three species of goods, viz., one-third in cows, one-third in horses, and one-third in silver. Ordinarily the amount of the fine in case of murder was double that in ordinary cases of manslaughter. An important element in the calculation of the amount of damages was the intention of the wrongdoer, both as to the person whom he intended to injure and the nature of the injury he intended to inflict. In the case of injuries inflicted on the person, it was attempted to schedule all possible hurts at different amounts. The laws of Athelbright, the Saxon King of Kent, who was baptized by St. Augustine, were on the same principle, and contain no less than 67 different

items of the sums to be paid for different injuries. Similar provisions existed in the laws of the other Saxon kingdoms. Alfred the Great was the first English King to enact laws for the punishment of murder by death. It is evident from the introduction to the Senchus Mor, that St. Patrick, prior to the compilation of that great work, endeavoured to introduce a similar law into Ireland, as he actually obtained the passing of a sentence of death on the murderer of his charioteer; but it is also evident that this form of punishment was not agreeable to the people, and was not afterwards insisted upon.

The punishment of wrongs resulting from negligence, as distinguished from wilful wrongs, is treated of under what are called "exemptions," and the attendant circumstances are considered to diminish the fixed amount of damages otherwise payable. The amount of these damages was also affected by what is now known as the contributory negligence of the injured party. It is evident from this and similar provisions, that the Brehon system would, under favourable circumstances, have developed into a modern civil code. If mercantile habits had been introduced and commerce established with other nations, the cumbersome preliminary proceedings would no doubt have been abandoned, as they gradually were abolished in England, and the Brehon would eventually have assumed the fixed position of a Judge. But no such development took place, and the legal distinction between crimes and torts was not carried beyond the incipient stage above mentioned, nor were the principles applicable to the cases of contract ever clearly distinguished from those applicable to torts or crimes.

The fourth and remaining volume contains miscellaneous tracts illustrating the land laws of Ireland under the Brehon system. The first of these is entitled, "On taking lawful possession." The ancient Irish never formed town communities, and had no fixed judicial system, all judicial authority, as already shown, being derived from voluntary submission to arbitration. The claimant of land, therefore, was, as in cases of claims for debts and damages, obliged, in the first place, to take the law into his own hands to compel his opponent to agree to arbitration before a Brehon. The claimant gave notice to the occupant that he intended to

enter on the land in pursuance of his claim. This notice was repeated at the end of ten days, and if no satisfactory answer was returned, then the claimant, accompanied by his witnesses, and leading two horses by their bridles, crossed the boundary and remained upon the border of the contested premises for a day and a night. He then left, and on the fifth and tenth days thereafter he repeated the notice. If satisfaction was still denied, he again entered with four horses and two witnesses, and advanced one-third of the way towards the centre of the lands. If the occupier was still obdurate, the claimant again withdrew, and for two days more gave notice of his intention to make his final entry. He then entered again with eight horses and four witnesses, some of whom had to be of chieftain rank, and this time he advanced to the centre of the land and took possession, unless the occupier submitted to arbitration. The periods required for the notices and entries were intended to give the occupier time to consider whether he would consent to arbitration, and the final entry was made in such a form that he was compelled either to do this or abandon possession. This procedure was very similar to the ancient law of Wales. The necessity of bringing horses, when making the different entries, was dispensed with in certain cases: for instance, in the case of a fort, or a church without land belonging to it, or an island, or a place where they were liable to be seized.

If the claimant failed to sustain his right to the land, he was considered in law a trespasser, and was compelled to pay damages accordingly, and these damages varied according to various circumstances of the case, prominent among which was the question as to whether there was a full fence, a half fence, or no fence at all. There is only one case mentioned in the Brehon law where a king was to be called upon to decide between two subjects, and that was where, in a dispute about the ownership of land, there was no local Brehon versed in the customary law of the district. The modern doctrine which, in a case of fraud, protects a purchaser for valuable consideration without notice, was recognized in the following provision: "In the case of a person who buys without stealing or concealment, with purity of

conscience, the purchase in his lawful property according to God and man; if his conscience is free, his soul is free." Certain persons could not enforce a contract against certain other persons, even if made according to legal forms: for example, a bondman against his chief, a son against his father, or a monk against his abbott. But if a "defective covenant," as it was called, was once acknowledged as binding by the chief, the father, or the abbott, he could not afterwards repudiate it.

In considering the tract entitled, "The Succession to Land," it must be borne in mind that the ownership of the undivided land was vested in the tribe, and that the rights of each member were only temporary and personal. And even where land was allowed in separate ownership, it did not descend, upon the owner's death, to the persons whom we now consider would be his heirs. The owner, as head of the house, acquired the property for his household, and his possession was rather that of a manager of a partnership than of an absolute owner. The household did not necessarily include all his descendants, as sons or daughters might have left it in his lifetime; and it often included persons who were not descendants. Upon his death, the property descended to the other members of the household as joint tenants. Each successive head had certain limited rights of alienation, but he could make no disposition of the land, to the detriment of the next four generations of his descendants. When the entire line of inheritors gave out, the land thus left without an owner fell back into the general tribe land out of which it had been taken, or, in some exceptional cases, became the property of the chief.

The contents of the next tract, which is entitled "Judgments of Co-tenancy," shows that the idea of exclusive ownership of land, did, however, exist in certain cases. Thus the members of a household who were joint tenants under the law, might, by their unanimous consent, sever the joint tenancy. After the division had been made, the duty of fencing their respective shares fell upon the several parties. The different kinds of fences were specified; and the shares to be built by each owner, as well as the means of enforcing

this duty, were carefully prescribed. The claims for trespasses of horses, cattle, pigs, hens, dogs, and even cats, were all minutely provided for. The various kinds of "man trespass," as it is called, are also enumerated, and the compensation therefor is specifically laid down. In certain specified emergencies, the breaking down of fences and crossing another's land is justified, provided the trespasser observed the minute regulations laid down for the purpose. Agricultural leases were not unknown, but in such cases they were purely matters of mercantile contract, instead of representing the position of lord and vassal as in England. They were entirely distinct from the cattle tenure between chief and tenant, previously referred to.

Another tract is entitled "Bee Judgments." The culture of bees in the middle ages possessed an importance which, in our modern days, it has altogether lost. Sugar being very rare and expensive, honey was largely employed to sweeten food, and beeswax was extensivly used for candles. It is quite natural, therefore, that the subject of bees should have occupied the attention of the Brehons. Even the great legal authority Blackstone did not deem it beneath him to learnedly discuss the same question in his Commentaries on the law of England. The ownership of bees, their honey, and their swarms, are all minutely provided for under all possible conditions, and provision was also made for compensation, not only to persons stung by bees, but to persons whose bees were killed, either intentionally or inadvertently.

The subject of "Right of Water" is treated of in another tract. Water mills were introduced into Ireland by King Cormac Mac Art in the third century, and there being no ancient customs with reference to them to fall back upon, the Brehons proceeded to build up on the subject, by analogy, a body of what is, in modern days, known as "judge-made law." One of the first and most necessary provisions was that "every co-tenant is bound to permit the other co-tenant to conduct drawn water across his border." Lands could be compulsorily taken for the construction of a mill race or pond, but the lands of a church, a dun, or a fair green were exempted from this liability. The owners of mill

courses were exempt from damages for accidents arising from their construction.

In the tract entitled "Divisions of Land," we get the Irish table of superficial measurements, which was as follows: Three grains to an inch, six inches in a hand, two hands in a foot, six feet in a pace, six paces in an "intritt" measure, six intritts in a "lait" measure, and six "laits" in a "foract" measure. The translators were unable to find any corresponding English words for the last three measures.

The tract which retains its Irish title of "Crith Grabhlach" gives a detailed description of the several social ranks and organizations of the Irish tribes. The laity were divided into seven grades, to correspond with the seven orders in the church. In the sequel to the tract it is laid down that the highest dignity on earth is that of the church, the highest dignity in the church is a bishop, and the highest bishop is "the Bishop of Peter's Church." Various penalties are provided for injuries to the clergy, according to their official position and the nature of the injury inflicted, but one-third of the penalty specified was to be deducted if the cleric was married, which shows that, while celibacy was favoured, it was not then insisted on, among the secular clergy. A further short and unnamed fragment of a tract dealing with the law of succession completes the fourth volume.

This brief but necessarily very incomplete sketch of the ancient laws of Ireland will enable us to place some estimate upon their merits as well as their defects. The latter were attributable to the circumstances under which these laws were first formed, and the absence of any Parliamentary or other power to repeal obsolete laws, or to introduce necessary amendments. The existence of an hereditary legal caste like the Brehons withdrew the laws from the criticism of public opinion, and, in a measure, no doubt, prevented the establishment of legislative and judicial authority. While, therefore, much that has been said against these laws by prejudiced and ignorant English writers is open to strong objection, still it must be admitted that they were an obstacle in the way of any considerable social or commercial progress. The laws were made largely for the advantage of

the ruling classes. The English real property laws were at one time certainly open to the same objection, but the Courts and Parliament during the past century have effected many radical reforms in these laws.

But if we are to judge of the Brehon laws on the whole, and see how far they were adapted to attain the end which is the great object of all law, viz., not merely to settle disputes as they arise, but to infuse into the hearts of the people a love of justice, we shall find that the great lawyer who was most responsible for the final overthrow of the Brehon laws, and who freely criticized their provision, has himself furnished the strongest testimony to their beneficial effect upon the Irish race. Sir John Davis, Attorney-General to James I., in concluding his none too friendly report on the state of Ireland, felt constrained to make the following remarkable admission: "There is no nation of people under the sun that doth love equal and indifferent justice better than the Irish, and will rest better satisfied with the execution thereof, although it be against themselves, so as they may have the protection and benefit of the law when, upon just cause, they do desire it."

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PLEADING IN ONTARIO.

One of the most remarkable changes produced in the law of Ontario by the combined effect of the Common Law Procedure Act of 1874 and the Judicature Act of 1881, has been the lessening in importance of the subject of pleading. From being one of the most exact of sciences, or, more properly speaking, one of the most elaborate of the arts, a knowledge of which was of fundamental importance to the practice of the profession of law, it has become a part of the practice of that profession of distinctly secondary importance, and its position as a main element in the equipment of a good lawyer has been seriously threatened. Certain judicial utterances, however, have pointed towards a renaissance in pleading. The remarks of Mr. Chief Justice Meredith in Brock v. Tew (*a*) particularly point in that direction: "I think it is time that the pendulum was swung back a little in this practice as to pleading. It is getting now into such a condition that it is almost impossible to say that there is any such thing as a pleading on the part of defendant or plaintiff. . . . In drafting pleading of this sort, I am afraid the party or counsel drafting it forgot not only that the solicitor or counsel on the other side have to be advised of the issue tendered, but that the Court, when the record reaches it ought to find a record which would direct its attention specifically to the points at issue. . . . We are drifting and have drifted into a shockingly bad system of pleading." The expressions of the learned Chief Justice have been referred to with approval in several recent cases, and there appears to be a growing tendency on the part of the Judges to deal very summarily with loose pleading, for, though it is true that the golden rule of modern times is to exclude nothing that tends towards a fair adjudication of the rights of litigating parties, it is equally true that the Court insists now, as it always has insisted, upon the parties stating their case with precision and lucidity.

(*a*) 18 P. R. at p. 30.

In very early days, long before "special pleading" was known, the system adopted by the Courts in England to arrive at the issue between the parties, was, both parties being present, to ask the one complaining to state his case. This the party did in open Court, either by himself or through his counsel, and the substance of what he said was transcribed by the recorder of the Court. The complainant told his "tale," or, as it was called in Norman French, "conte" (the precursor of our present word "count"), and offered to prove the same by certain named witnesses. In those times it was incumbent on the defendant to deny the plaintiff's "conte" with almost painful accuracy, but towards the latter part of the thirteenth century a more general form of denial prevailed; thus, in an action of trespass the defendant would say, "A., who is here, defends against B., who is there, and against his suit, the tort, and the force, and all that is against the peace, and the damages, and all that he surmises against him, word by word." This has been called the "thwertutney" or "downright no" of early pleading.

The defendant then proceeded to examine the complainant's suit or "secta" of witnesses. He must then produce his secta of witnesses. A decision was arrived at by the Court if the point raised were an "issue en ley," or by a jury if it were an "issue en fet," and this distinction appears in the year books as early as the time of Edward I. Later on it became a common practice for the defendant, instead of pleading a "downright no," to plead an "exception." The exception or "exceptio" originally obtained in the Petty Assizes, a tribunal called for by the complainant, and summoned from the country to try a particular question. For instance, A asks an assize of mort d'ancestor to try the question whether his father was seized in fee of Blackacre, and whether he (A.) is next heir. This is for the purpose of ousting B., who occupies Blackacre, but it may very well be that A.'s ancestor had sold Blackacre to B., whereupon B. enters an "exceptio" to the assize, that is, he alleges some reason why the assize should not proceed without determining some preliminary question; for instance, in the above example, whether A.'s ancestor did sell Blackacre to him (B.).

These exceptions, once introduced, spread with great rapidity throughout all the ancient forms of action, and constituted the basis of what in later times was known as the science of special pleading. The oral pleading of the latter part of the thirteenth century, therefore, resolved itself into an altercation in open Court by the parties or their counsel, the defendant setting up one thing after another by way of preliminary objection to the writ; and, in the event of all his objections being overruled, pleading the general issue, the old "thwertutney" or "downright no" of earlier times. The various points so taken, the answers of opposing counsel, and the adjudication of the Court, were written down during the progress of the altercation by the recorder, and, after this sifting process had proceeded for some time, the Court determined upon the crucial fact or point of law between the parties, and further decided upon whom the onus lay of proving such fact or establishing such point. This constituted the issue between the parties, and was also inscribed by the recorder, the result of whose labours constituted the "record." As distinguished from the system of pleading prevailing in the majority of continental countries, therefore, the above described system resulted in the production of an issue.

It is of interest to note that this method of viva voce pleading was almost universal among early European communities. It is said to have prevailed among the Lombards and among most of the Germanic tribes. The office of a professional pleader has been traced to times extremely remote. The Assize de Jerusalem, a recognized authentic compilation from the laws of France, made about the close of the eleventh century, gives a full account of the office, duties, and qualifications of a pleader (*b*). This unique document contains the following admonition: "A good pleader ought to have good sense and sound understanding and a subtle genius. He should be free from the faults of indecision, timidity, false shame, haste, and nonchalance. While he pleads he should keep his attention from wandering to any other subject, and he should also take care to avoid undue heat and asperity."

(*b*) Stevens on Pleading, 368.

Oral pleading prevailed until the middle of the reign of Edward III. (*c*). when, for the first time, written pleadings were introduced. At first the parties or their representatives recorded their pleadings themselves in the Court record, but afterwards it became customary for the pleadings to be delivered by the parties to each other, and only the issue finally arrived at was recorded.

The system of pleading at law consisted shortly of the writ, the pleas to the writ, and the replication to such pleas. A defendant might either plead or demur. Pleas, broadly speaking, were divided into three classes: (1) dilatory pleas, (2) pleas in abatement, and (3) pleas in bar; the first of which, while furnishing no answer to the writ, alleged some reason why the suit should not proceed; the second were pleas to the jurisdiction, and alleged some ground such as the non-joinder of a necessary party which should prevent the suit from proceeding in its present shape; and the third went to the merits of the action. Pleas in bar consisted of traverses, which might be either general or special, and pleas in confession and avoidance. The former was a denial, the latter a plea which, while admitting the truth of the statement set out in the writ, avoided the consequences of such a statement by alleging some extenuating circumstance or circumstances. The plaintiff might reply either by demurring, or by setting up what was known as a new assignment or new cause of action, or he might enter a nolle prosequi. Pleading in equity was by way of bill, to which an appearance was entered, an answer made, and replication.

The refinements introduced by the subtlety of the early special pleaders reduced the system of pleading at law in some cases to a farce, the merits of the action being entirely lost sight of. An attempt was made by the Common Law Procedure Act of 1874 to remedy this state of things, but it was not until the Judicature Act was passed that the death blow was given to the elaborate system of special pleading which had been built up upon the foundation of the ancient "exceptio."

(*c*) 3 Reeves, 85.

By the Judicature Act the ancient "forms of action" were abolished. The pleader was required to state facts, and not as formerly conclusions of law. The old forms of pleading the "general issue" or "not guilty" were abolished, as were also demurrers, pleas in abatement, and new assignments.

It is impossible here to deal in any extended way with the subject of modern pleadings, and no attempt will be made to do so. Some few points, however, are worthy of attention. With regard to the statement of claim, it is of importance to observe that under the practice in England a plaintiff is required to be much more concise and particular than under the practice prevailing in our own Courts. The English Rule provides that a pleading "shall contain and contain only a statement in a summary form of the material facts upon which the party pleading relies." The language of our Rule is, "pleadings shall contain a concise statement of the material facts," etc. The statement of claim under the English practice, therefore, more resembles the special indorsements to our writs of summons than anything else, and the decisions in England upon this Rule narrow the plaintiff very much more than the decisions in our own Courts. It would almost seem to be the logical result of some of the decisions in our Courts that nothing is improperly included in the statement of claim that is not absolutely irrelevant to the matters in controversy. The new Rule 244, which enables a plaintiff to alter, modify, or extend his claim without any amendment of the indorsement of his writ, would appear to be another step in the same direction. It is true that under the Common Law Procedure Act a plaintiff might in his declaration extend the claim made in his writ. The language of Chief Justice Draper in Sowden v. Sowden (*d*) is to the effect that if there be any other demand due to the plaintiff at the time he issues his writ this demand may be included in the declaration, though it be not included in the special indorsement. The added demands in this case were, however, of the same character as the demands included in the writ,—in fact in two instances were interest

(*d*) 4 P. R. 276

on the sums set out in the writ. If the new Rule means nothing more than this, there would not seem to be much reason for passing it. If, on the other hand, it does mean more, it is hard to tell just where the process of expansion will stop. The "delivery" spoken of in this new Rule, however, means an actual and not a constructive delivery as by posting up. In the latter case the plaintiff is bound by the particulars in his writ, as he would appear to have been under the Common Law Procedure Act.

A statement of claim cannot, as a general rule, include a claim that has arisen since the issuing of the writ (*e*), except perhaps where some further relief is sought by reason of the new matters set up (*f*).

The statement of defence should set up all relevant facts upon which the defendant intends to rely which are not included in the statement of claim. If it is his intention to rest on a bare denial of all the facts in the statement of claim, he may do so in so many words, or he may, it would seem, "take issue" upon the statement of claim. This course was suggested as the proper one by Mr. Justice Rose in Hare v. Cawthrope (*g*), and it was stated that the effect of such a pleading would be that the pleadings would be closed and there would be no necessity for a plaintiff delivering a joinder of issue. In Irwin v. Turner (*h*) Mr. Justice Meredith says that the decision in the above case came as a "surprise to the profession, such a thing as a joinder of issue before plea pleaded being until then an unheard of proceeding." There seems to be no reason in the nature of things why a defendant should not use this form of language as well as any other to deny the allegations in the statement of claim. It was the common form used in the early days of English pleading, but whether it would have the effect of closing the pleadings, so as, for instance, to start the four days running within which a jury notice must be filed and served, is quite another matter. It would seem that the distinction men-

(*e*) McLean v. McLean, 17 P. R. 440.

(*f*) Yorkshire Waggon Co. v. Cornwall Minerals, etc., 79 L. T. Jour. 120.

(*g*) 11 P. R. 353.

(*h*) 16 P. R. 352.

tioned by Mr. Justice Meredith in Irwin v. Turner between "taking" and "joining" issue would be of importance in determining this question. It might be said that the defendant may "take" issue upon the plaintiff's statement of claim. He may use this form of words as well as any other to deny all the allegations the plaintiff may make, but it is for the plaintiff then to close the pleadings by "joining" issue upon this general denial of the defendant. The point does not appear to have been raised in any form since the two decisions above referred to.

Contrary to the corresponding Rule regarding statements of claim, grounds of defence arising after action brought, but before defence, may be pleaded (Rule 289 et seq.). The Rules also provide that where a defence raises questions between the defendant and the plaintiff together with some third party who is not a party to the action, the third party may be brought into the action by service upon him of the statement of defence (in such a case styled a statement of claim), and he must appear to it in the same way as though he had been served with a writ and defend within the usual eight days. The plaintiff may counterclaim against the defendant's counterclaim by setting up anything that has arisen since the issuing of the writ, but not by setting up something anterior to the date of the writ. This must be done by amendment to the statement of claim. In General Electric Co. v. Victoria Electric Co. (*i*) it was decided that a person brought into an action by counterclaim as above mentioned cannot counterclaim against the defendant bringing him in. "It is obvious that some limit must be placed upon the right of endless counterclaims, because that right once admitted gives the right to bring in new parties with new claims:" per Street, J.

The plaintiff can deliver a defence to a counterclaim within eight days and take his allotted three weeks to reply, but a defence and counterclaim must be one pleading. The defendant (or plaintiff by counterclaim) probably has three weeks to reply to the defence of the plaintiff (or defendant by counterclaim), though there is no express Rule on the point.

(*i*) 16 P. R. 529.

Contrary to the English Practice, our Rules provide that with certain specified exceptions the silence of a pleading as to any allegations contained in the previous pleading of the opposite party shall not be construed as an admission of the truth of such allegations. Historically this is the rule which prevailed in the civil law as distinguished from the rule obtaining under the Norman-French system of procedure. The exceptions laid down in the Rules are, (1) the right of a party to sue in a representative capacity, (2) the incorporation of a corporate party, and (3) the legality or sufficiency of a contract in point of law. These must be specifically denied. Judicial interpretation has, however, somewhat qualified this rule, so that the pleader who confidently expects to put his adversary to the proof of certain facts, simply because he has not admitted them, sometimes finds that he has reckoned without his host. In Richardson v. Jenkin (*j*) Mr. Justice Rose held that where a pleading contained an answer to allegations in the opposite pleading which answer was insensible if not read as admitting certain statements in that pleading, those statements must be taken to be admitted. "Rule 148 does not say every material allegation shall be taken as expressly denied unless expressly admitted by the pleading of the opposite party, but that the silence as to any allegation, which, read with Rule 128, I take to mean every material allegation, shall not be construed into an implied admission. When, therefore, silence is not maintained, but an answer given which is insensible if it is not to be read as admitting certain statements in the former pleading, I am of opinion that such statements must be taken as admitted."

In Hollender v. Ffoulkes (*k*) Mr. Chief Justice Armour, delivering the judgment of a Divisional Court, further qualified the meaning of Rule 272. This was an action on a foreign judgment, to which the defendant pleaded that the foreign judgment was obtained upon a false affidavit, and that the plaintiffs obtained the judgment by fraudulently concealing from the Court the true nature of the transactions be-

(*j*) 10 P. P. 292.
(*k*) 26 O. R. 61.

tween them and the defendant. The plaintiffs replied that the defendant was precluded by law from raising any question as to the validity of the foreign judgment which might have been raised by way of appeal in the foreign forum. Chief Justice Armour said: "This replication was equivalent to a demurrer to the like effect under the former practice, and was an admission of the truth of the facts stated in these paragraphs, and to such a replication Con. Rule 403 (now 272) has no application;" and it being held that the defence was good, the plaintiffs were given leave to amend their replication on payment of costs.

The recent judgment of the Supreme Court of Canada in Home Life Association of Canada v. Randall (*l*) contains an interesting decision as to the effect of this Rule. The action was upon a policy of insurance, one of the conditions of which policy was that before the payment of it certain specified proofs of death must be furnished. In the statement of claim the plaintiff alleged a general compliance with all conditions, as well that relating to proofs of loss as others, and the statement of defence, after admitting the allegations contained in paragraph 1 of the statement of claim, denied the other paragraphs and put the plaintiff to the strict proof thereof. Issue was joined by the respondent on this defence. The case turned, to a large extent, upon the sufficiency of the proofs of death furnished by the plaintiff. Judgment was given by the Chief Justice of the Queen's Bench for the plaintiff, without costs, from which an appeal was taken to the Court of Appeal. The judgment of the Chief Justice was unanimously affirmed by the Court, the Chief Justice of Ontario, Mr. Justice Osler, and Mr. Justice Moss holding in effect that the company had waived the requirements as to proofs of death, while Mr. Justice Maclennan proceeded upon the omission of the defendants to set up in their statement of defence any objection to the non-delivery of sufficient proofs of loss.

The Chief Justice of Canada, in delivering the judgment of the Supreme Court, says (*m*): "The course of pleading has

(*l*) 30 S. C. R. 97.
(*m*) 30 S. C. R. at p. 103.

not now very much departed from the old forms of common law pleadings; substantially, however, the rules remain the same. Probata secundum allegata is just as much the rule as it ever was. There can be no doubt upon the plain words of the policy that delivery of proofs of a valid cause of death was an essential condition precedent which it was incumbent on the plaintiff in the action to establish both in pleading and in proof, and it was incumbent on her to show that she had ninety days before action furnished the required proof. This requirement as to pleading was sufficiently complied with by the allegation contained in the 4th section of her pleading that she had duly furnished to the defendants proof of the death of her husband and of a claim under the contract and policy and by the further general allegation that all conditions were performed, all things happened, and all times elapsed necessary to entitle the plaintiff to be paid the sum assured. . . . Under the old rule of pleading which prevailed before the Common Law Procedure Act, specific allegations of performance of conditions precedent were required. This was altered by that Act, which permitted a general allegation of performance to be substituted for the former more precise mode of pleading. And this, I understand, must still remain the law in Ontario. . . . The appellants by their pleading in defence sufficiently put this in issue by the second paragraph denying the allegations of the respondent and putting her to "strict proof thereof." Even if there had not been this denial, but the appellant had allowed the averment to pass sub silentio, the respondent would still have been obliged to establish that she duly furnished proofs of loss, for the Rules under the Ontario Judicature Act, in this respect again differing from the English Act, provide that all allegations not specifically admitted shall be taken as denied." The judgment of the Court of Appeal was reversed.

By virtue of Rule 251 it is open to a defendant to set up by way of counterclaim any claim or right whether the same sound in damages or not. The result of the introduction of this Rule is that practically all claims, whether in the nature of set-off or counterclaim in the more limited sense of the word, are now set up by way of counterclaim, and

the distinction between these two classes of claims is being rapidly lost sight of. The distinction is only of practical importance to-day in certain cases where a question of costs arises, because a true set-off does not lose its character by being pleaded as a counterlcaim, and the costs are taxable on the same principle as they would have been before the Judicature Act (*n*). Thus if a matter be successfully pleaded by way of set-off which extinguishes the plaintiff's demand, the defendant will be entitled to the costs of the action, but, if the same matter be pleaded by way of counterclaim, the plaintiff would recover upon his claim with costs, and the defendant would recover upon his counterclaim with such costs as were applicable to the counterclaim. The general costs of the action would probably go to the plaintiff, even though the amount recovered by the defendant were larger than the amount recovered by the plaintiff (*o*). Again, if a defendant pleads liquidated damages as a counterclaim, the plaintiff may reply by pleading matters arising since the issuing of the writ, whereas if such were pleaded as a set-off it would not be open to the plaintiff to do so. A set-off is a cross-demand balancing or extinguishing the plaintiff's demand. The right to set such a demand up in answer originated in the statutes of set-off, 2 Geo. II. c. 22 and 8 Geo. II. c. 24. These statutes only extended such a right to what were called "mutual debts," but the Courts of equity extended the practice, so that equitable set-off became much wider than the statutes originally contemplated. A counterclaim, on the other hand, is a cross-action. It does not affect the plaintiff's demand at all. Previous to the Judicature Act the defendant would have had to bring a separate action to enforce it, but that Act for the first time gave a defendant the right to set up such a claim in the plaintiff's action.

The late Master, Mr. Dalton, appears to have been decidedly of the opinion that a counterclaim was not a separate action, but that it was a defence. In Irwin v. Brown (*p*)

(*n*) Cutler v. Morse, 12 P. R. 594; Sanderson v. Ashfield, 13 P. R. 230.
(*o*) Re Brown, Ward v. Morse, 23 Ch. D. 377.
(*p*) 12 P. R. 639.

he says: "Whatever a counterclaim may be besides, it is first and principally a defence to the plaintiff's action:" and in Macara v. Snow (*q*) he says: "It is of much more importance here to point out that a counterclaim must be a defence in the action in which it is pleaded, or it cannot be good." On the other hand, it has been stated (*r*) that "a counterclaim is not a defence; it is something quite different, something which, strictly speaking, never could be pleaded by way of defence." And, in view of the later English cases, this would seem to be the sounder view. For instance, if judgment be obtained on both claim and counterclaim, these judgments can be garnished. Discontinuance of the plaintiff's action does not stop the defendant proceeding to judgment on his counterclaim (*s*), and a counterclaim may be revived after the death of the defendant independent of the revivor of the plaintiff's claim (*t*). A counterclaiming defendant may be ordered to give security if he is out of the jurisdiction, and if the counterclaim is not connected with the same subject as the plaintiff's claim (*u*). But though it is true that a counterclaim against a plaintiff alone need not be connected with the plaintiff's claim, if such counterclaim is against the plaintiff together with someone else, it must be connected with the plaintiff's claim. If not, a separate action must be brought against these two by the defendant. The remarks of Mr. Dalton, it would appear, would properly be applicable to this latter case.

In Chamberlain v. Chamberlin (*v*) Mr. Justice Ferguson pointed out that by reason of the peculiar wording of the statutes of set-off a claim arising since the commencement of the action cannot be pleaded as a set-off, though it may be the subject of a counterclaim:—"The language of the plea of set-off is understood as applying to the state of the

(*q*) 12 P. R. 616.

(*r*) Per Meredith, J., in General Electric Co. v. Victoria Electric Co., 16 P. R. at p. 479.

(*s*) McGowan v. Middleton, 11 Q. B. D. 464.

(*t*) Andrew v. Aitkin, 30 W. R. 701.

(*u*) The J. Fisher, 2 P. D. 115.

(*v*) 11 P. R. 501.

accounts between the plaintiff and defendant at the commencement of the suit." (*w*).

Though demurrers have been abolished, it is still open to a pleader to plead a point of law in his pleading. The only practical use in so pleading is to be able to move before trial to have the action determined upon the point of law so raised, the facts being all admitted. It is not necessary to plead a point of law to be entitled to raise it at the trial. The practice of deciding an action on a point of law raised by the pleadings before trial has, however, not yet met with very much encouragement from the Bench. In Graham v. Temperance, etc., Co. (*x*) Mr. Justice Street directed the trial of a preliminary issue on a point of law raised by the pleadings, but the experiment did not result very satisfactorily to either party. One of the cases recently tried and settled by the Toronto sittings was an action brought by executors for a tort more than a year after the death of the person in whom the cause of action was originally vested. Counsel for the defendants attempted upon three different occasions to have this action disposed of upon the preliminary objection raised by the pleadings to the right of the executors to sue, but the Court upon all three occasions refused to make the order asked for.

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(*w*) And see McNamara v. Skain, 23 O. R. 103.
(*x*) 16 P. R. 536.

EDITORIAL REVIEW.

Jurisdiction of County Courts.

The Ontario Legislature had before it at this session a bill designed to confer upon the County Courts a very much more extended jurisdiction than they have hitherto enjoyed. The object appears to be to give the County Court Judges something more to do. It is also said that it will relieve the High Court Judges of a large part of their circuit work, and leave them free to devote themselves to more important cases, or cases in which larger amounts are involved. We doubt whether the latter result will be achieved if the bill ever becomes law. There will be more appeals, if fewer trials, and it takes, or ought to take, three High Court Judges to hear an appeal, and only one to try an action. There would, however, be a certain amount of relief to the Court of Appeal, which would be welcome. Incidentally, the bill deals a final blow at Toronto agency work and at anything like uniformity in matters of practice.

The Position of County Court Judges.

Rightly or wrongly, less confidence is felt in the decision of a County Court Judge than in that of a High Court Judge. It may be that some particular member of one bench is the equal in learning and ability of a particular member of the other, but even in that case, and granting the recognition of the fact by persons interested, the County Court Judge suffers from his isolation and from the absence of a strong bar practising before him. A County Judge does not usually increase in judicial stature after his accession to the bench, as does a Superior Court Judge, who has the association of his fellows and the stimulus of the strongest intellects at the bar to keep him up to his work.

Criminal Corporations.

Another fruitless attempt has been made, this time in Manitoba, to fix upon an incorporated company the crime of manslaughter. See Regina v. Great West Laundry Co., 20 Occ. N. 217, where a demurrer to the indictment was allowed.

BOOK REVIEW.

Practical Statutes, being a collection of Statutes of Practical Utility in Force in Ontario, with Notes on the Construction and Operation thereof, by James Bicknell and Arthur James Kappele, of Osgoode Hall, Barristers-at-Law. Toronto: Goodwin & Co. 1900.

What statutes are of "practical utility" — the phrase smacks of Johnson — or rather, what statutes are not of practical utility? The railer will say that many of the enactments of the Ontario Legislature are of practical inutility. But the learned authors, or editors, of the present volume—a very big one and a sort of library in itself—do not express any opinion as to whether the statutes they have selected are useful to the public or not. They do venture the assertion that there are few subjects of concern which are not affected by some statute; and what they have done is to select those which are of most concern to the practising solicitor, not to the public, and to collect the authorities which throw light upon their construction. Thus we have groups of statutes. "Practice and Procedure" is, of course, one, but is not the only one. The others are: "Construction and Operation of Statutes," "Canadian Constitutional Law," "Evidence," "Torts," "Contracts," "Personal Property," "Equity," "Commercial Law," "Real Property." Those intensely practical statutes the Division Courts Act and the Municipal Act have not been included, but they are the subject of independent works. The annotations have not been taken from Ontario alone. The work is indeed exhaustive as regards Ontario decisions, but a large number of English cases are also given. The text of each statute is first set forth intact, and then follow the notes upon it, which are avowedly confined to an "endeavour to state what the Courts have said the statutes mean and what their effect is as a result of the decisions." This gives

a fair idea of the method and scope of the work. A great deal of industry has been displayed, not only in collecting cases, but in keeping them down, and in making the statement of their effect concise. The Law Society's selection of statutes to which the attention of students is demanded, has been closely followed, and the book will, therefore, it is predicted, be a favourite with men who are seriously trying to qualify themselves for practice, though its arrangement is more suited to the achievement of its primary object, that of supplying a work of reference for the solicitor launched in active professional life. Recent Canadian law books have shown a marked improvement in printing and general make-up, and this is no exception.

THE
CANADIAN LAW TIMES.

JUNE, 1900.

MORTGAGEE'S COSTS, CHARGES, AND EXPENSES.

THE general measure by which it may be ascertained whether a mortgagee will be allowed to add to his mortgage claim the costs, charges, and expenses incurred by him in respect of the mortgaged premises and of his mortgage security, is this:—Did he act reasonably and as a prudent man would have acted in the conduct of his own affairs?

Where a mortgage was attacked upon the ground that it was invalid, and the mortgagee paid certain solicitor and client costs in the defence of that suit over and above the taxed costs, he was allowed to add the whole of these costs to his mortgage claim, upon the ground that the same were a reasonable expenditure incurred in the defence of his mortgage security (*a*).

And in the same case he was allowed to add to his mortgage claim the costs, incurred by him in the Spiritual Court, of obtaining administration to the personal estate of the mortgagor, so that he might repay his mortgage claim from that estate in the event of his being unable to successfully defend his mortgage.

Where a first mortgagee had been to great expense in law suits to foreclose the mortgagor, and otherwise in relation to the estate, and a suit was then brought by the second mortgagee to redeem the first mortgage, it was ordered that the said costs of the first mortgagee should not be taxed as in an adversary suit, but that the mortgagee should be allowed all his costs and expenses, as is done in the case of a solicitor who lays out and disburses money for his client and the like (*b*).

(*a*) Ramsden v. Langley, 2 Vern. 536.
(*b*) Lomax v. Hide, 2 Vern. 185.

Success or want of success on the part of the mortgagee in litigation with respect to his mortgage security, is not always a true gauge of his right to add the costs of such litigation to his mortgage claim, although, as a usual rule, it will be held to be a correct measure of his rights in that respect. Thus a mortgagee was allowed to add to his mortgage claim the costs of an action at law brought by him against a person who had joined the mortgagor as surety in a bond to secure payment of the mortgage money, although such action on the bond was rendered fruitless by the insolvency of the surety (*c*).

This case is authority for the proposition that the mortgagee is entitled to add to his mortgage claim all expenses properly incurred by him in attempting to recover his mortgage money, and that all usual modes may properly be adopted by him in enforcing payment under any of the covenants, powers, and provisions contained in his mortgage security.

It is true that in the subsequent case of Lewis v. John (*d*) V.-C. Shadwell acted upon a principle opposed to this, and refused to allow a mortgagee, as against the devisees of the equity of redemption, to add to his mortgage claim the costs incurred by him in an action brought by him against the executrix of the deceased mortgagor, upon a bond given by the mortgagor to secure the mortgage money, which action he had abandoned upon the executrix pleading plene administravit, and had thereupon commenced an ordinary mortgage suit for sale, in which latter suit the judgment in question was given.

In Merriam v. Bonney (*e*) V.-C. Kindersley says:—"I feel bound to say that if it had not been for Ellison v. Wright I should have thought that costs of an action on the covenant were not costs in relation to the mortgage security."

The same question came up for discussion before Lord Romilly, M.R., in Peers v. Ceeley (*f*). There a mortgagee had a power of sale and of retaining his costs, charges, and

(*c*) Ellison v. Wright, 3 Russ. 558 and C. P. Cooper 8.
(*d*) 9 Sim. 366; C. P. Cooper 8.
(*e*) 10 Jur. N. S. 534; 12 W. R. 461.
(*f*) 15 Beav. 209.

expenses. He sold the mortgage property, but the purchaser refused to complete the sale on the ground of misdescription of the premises. The mortgagee, being advised by eminent counsel that the objection was untenable, filed a bill for specific performance of the contract, which bill was dismissed with costs. The mortgagee afterwards filed a mortgage bill for sale, and sought to add the costs of the specific performance action to his mortgage claim. Lord Romilly said:—"I think that the plaintiff is not entitled to the costs of the suit instituted against Lambert, which was dismissed with costs. The Court can never sanction the proposition that a party having acted in a manner which the Court has decided to be improper, can protect himself by showing that he had received bad advice, however eminent the person may be who gave it. That point, if it can have any weight, ought to have been urged at the hearing of the cause. Nor can it be safely or properly urged that the suit was for the benefit of the mortgagor; if so, he ought to have been asked to sanction it. There is no evidence that he in any way did so, or that it was instituted at his suggestion. It turns out that the suit was one which the Court decided to be improper, and that it directs the present plaintiff to pay the costs. Ellison v. Wright is distinguishable; there it was proper to bring the action against the surety, but it was rendered unavailable by the insolvency of the defendant, who was not able to pay that which the plaintiff was entitled to. The plaintiff was right in instituting the proceeding, though unable to make it available. I cannot hold that the mortgagor must pay the costs of a suit which the Court has decided to have been improperly instituted and which he did not sanction."

It will be noticed that the learned Judge's reference to Ellison v. Wright is not quite consistent with the above cited criticism of V.-C. Kindersley upon that case; the latter Judge thinks that if it had not been for Ellison v. Wright he would have held that the costs of an action on the covenant are not costs in relation to the mortgage security. Lord Romilly, on the other hand, treats Ellison v. Wright as properly decided, and endeavours to distinguish it from the case before him on the ground that the plaintiff in Ellison v. Wright had

been successful in his litigation with respect to the covenant in so far as his legal position was concerned, but had failed to realize anything in his action, solely by reason of the insolvency of the covenantor. Applying that reasoning to Lewis v. John, the mortgagee in that case should have been allowed to add his costs of covenant action to his mortgage claim, for his legal right to judgment in that action assets quando, was not disputed, but he doubtless discontinued his action upon the executrix pleading plene administraint, upon the ground that there was no probability that further assets would come to her hands.

Whatever doubt there may formerly have been as to the relative authority of these cases appears now to be set at rest by the judgment of the Court of Appeal in National Provincial Bank of England v. Games (*g*), where Lord Justice Cotton says: "As regards the authorities on this class of costs, I prefer Ellison v. Wright to Lewis v. John and Merriam v. Bonney so far as the latter two cases throw doubt upon the first." His Lordship then proceeds to say that the following extract from Seton on Decrees lays down the law in terms which are justified by the authorities:—" Both in foreclosure and redemption actions the mortgagee is entitled to the costs of suit and also to all costs properly incurred by him in reference to the mortgaged property, for its protection or preservation, recovery of the mortgage money, or otherwise relating to the questions between him and the mortgagor, and to add the amount to the sum due to him on his security."

In the same case of National Provincial Bank of England v. Games it was held that the mortgagee is entitled to tack to his mortgage claim the costs of an action at law brought by him against the mortgagor upon the covenant in the mortgage (although in that particular case the mortgagee was held to be precluded from recovering such costs by the terms of the consent order which had been made in the mortgage action). Lord Justice Fry says (*h*): "A mortgagee is a creditor, he has also a security for the debt, and whether he is trying to get his money from the mortgagor or from a

(*g*) 31 Ch. D. at p. 593.
(*h*) 31 Ch. D. at p. 595.

surety, or out of the mortgaged property, he is trying to enforce his rights as 'mortgagee;' and upon that ground it was there held that the mortgagee was entitled to tack to his mortgage claim his costs of certain correspondence had before action with respect to the mortgage security, not only with the mortgagor, but also with a person who stood in the position of a surety for the mortgage debt."

The case of Peers v. Ceeley (*i*) does not conflict with the rule which we have laid down, that the mortgagee will get his costs or otherwise according as he has acted reasonably or otherwise with regard to the litigation of which the costs are in question, but it lays down a rider to that rule, to the effect that the measure by which it shall be determined whether the mortgagee acted reasonably or otherwise may always be found in the answer to the question, was the mortgagee successful in the litigation? If he was successful he will, according to the rule in Peers v. Ceeley, be held to have acted reasonably; if unsuccessful he will, according to that rule, be held to have acted unreasonably. The general rule is stated by Chancellor Boyd to be that "a mortgagee is not allowed to add to his mortgage debt the cost of unsuccessful proceedings at law instituted by himself, and not undertaken with the approval of the mortgagor" (*j*).

It is submitted that these rules, although generally correct, are not of universal application, and that the circumstances of each particular case will have to be examined as occasion requires, in order to determine whether the action of the mortgagee was reasonable or otherwise.

The remarks of Jessel, M.R., and of Cotton, L.J., in Re Watts (*k*) show that the right of a mortgagee to recover costs does not always depend upon the question of his success or failure in litigation, but rather upon the reasonableness of the course pursued by him.

It will probably be safe to say that the rule which should be applied to a mortgagee in such a case is not less favourable than that which should be applied to a trustee who seeks indemnity out of the trust estate

(*i*) 15 Beav. 209.
(*j*) Weels v. Trust & Loan Co., 9 O. R. 170.
(*k*) 22 Ch. D. 5.

for the costs incurred by him in unsuccessful litigation prosecuted by him in his capacity of trustee. It has been laid down that the trustee will be entitled to such indemnity in those cases only where he has sued or defended under the advice of the Court, or where the Court if appealed to would have given such advice; and that the advice of counsel is no protection to him (*l*).

This rule cannot be applied literally to the case of a mortgagee, for a trustee is entitled in all cases to protect himself by coming to the Court for advice, while a mortgagee is not so entitled. The rule may, however, be applied by analogy to the case of a mortgagee and restated as being that the mortgagee is entitled to add to his mortgage claim the costs incurred by him in an action brought or defended by him in his capacity as mortgagee, even though he was unsuccessful in the litigation, provided always that the facts and circumstances known to the mortgagee, after making reasonable inquiry, were such as would probably have induced the Court to advise the action or defence, if the mortgagee had been entitled to apply for that advice.

In Dryden v. Frost (*m*), cited with approval by Cotton, L.J., in National Provincial Bank of England v. Games (*n*), Lord Cottenham, L.C., says:—"The Court in settling accounts between mortgagor and mortgagee will give the latter all that his contract or the legal and equitable consequences of it entitle him to receive, and all the costs properly incurred in ascertaining or defending such rights, whether at law or in equity. But even as to the costs in equity this Court exercises a discretion and refuses to him his costs if his conduct has been improper; and in some cases orders him to pay them. In Detellin v. Gale (*o*) Lord Eldon says, "he ought to be indemnified to the extent that he acts reasonably as a mortgagee; which must mean reasonably with respect to such mortgage rights as his mortgage title gives him."

Thus the mortgagee will be allowed to add to his mortgage claim the costs of administration procured by him to

(*l*) *Re* Beddoe, [1893] 1 Ch. at pp. 557, 558, 562.
(*m*) 3 My. & Cr. 675.
(*n*) 31 Ch. D. 592.
(*o*) 7 Ves. 583.

the personal estate of the mortgagor, where the Court deems such a course to be reasonably taken for his protection (*p*); or the costs of procuring administration to an incumbrancer when that is necessary in order to carry on a foreclosure suit brought by the mortgagee (*q*); or the costs of an action in ejectment brought by the mortgagee to recover possession of the mortgaged premises when the interest is in arrear (*r*); and where a mortgagee is proceeding to sell the mortgaged property under a power of sale contained in the mortgage, it is proper for him to supplement his sale proceedings by an action for the recovery of the land in order that possession may be delivered to the purchaser at the time of sale (*s*).

A mortgagee is entitled to add to his mortgage claim the costs of an abortive sale had under the power of sale in the mortgage (*t*).

Where a mortgagee has been put to expense in defending the title to the estate, the defence being for the benefit of all parties interested, he is entitled to charge such expenses against the estate (*u*); but it is said that if his title as mortgagee only, and not the title to the estate, is disputed, the costs of the defence should not be borne by the estate as against parties interested in the equity of redemption, unless they can be shown to have concurred in or assisted the litigation (*v*); and it has been held that the mortgagee will not be allowed to tack to his mortgage claim the costs of litigation wrongfully directed against him personally by a stranger, even though such litigation be commenced in respect of the mortgaged estate; thus, for example, a mortgagee was on this ground disallowed the costs of an action of trespass, wrongfully brought against him by a stranger, whose sole ground of complaint was that the mortgagee had entered the mortgaged premises (as he had a right to do) under the provisions

(*p*) Ramsden v. Langley, 2 Vern. 536.

(*q*) Hunt v. Fownes, 9 Ves. 70.

(*r*) Sandon v. Hooper, 6 Beav. 246; Horlock v. Smith, 1 Coll. 298.

(*s*) Trust & Loan Co. v. McGillivray, 7 P. R. 318; but see now R. S. O. c. 102, s. 30.

(*t*) Sutton v. Rawlins, 3 Ex. 407; Farrer v. Lacy, 31 Ch. D. 42.

(*u*) Parker v. Watkins, 1 Johns. 133; Godfrey v. Watson, 3 Atk. 517.

(*v*) Parker v. Watkins, 1 Johns. 133.

of his mortgage, and had in so doing turned the stranger out of possession, which he was holding without any colour of right (*w*).

Equitable mortgagees of goods unsuccessfully defended an action brought against them by a stranger to the mortgage transaction for recovery of the value of a portion of the goods included in the mortgage, which portion the stranger successfully maintained were not the property of the mortgagor. The mortgagees incurred costs in defending this action and also had to pay the plaintiff's costs thereof. The mortgagees were held to be entitled to add to their mortgage claim the whole of the costs so incurred and paid by them, but not the costs of an unsuccessful appeal in that action (*x*).

Lord Justice James said: "The only question is whether the costs were reasonably and properly incurred. The registrar thought that it was a reasonable thing for the bank to defend the action, but that, when the judgment went against them, it was not reasonable for them to appeal. I think the registrar was right, and I concur in his conclusion that the costs of the action should be deducted from the value of the bank's security. . . . A mortgagee is entitled to deduct from the value of his security that which is in the nature of salvage money, his reasonable expenses of defending his title." (*y*)

Lord Justice Brett said:—"The mere fact of their defending the action would not give them the right to charge the costs of it against their security. But I agree with the registrar that the defence is a reasonable one." (*z*)

Lord Justice Cotton said:—"The costs in question were expenses incurred by the bank in defending their title to goods which the bankrupt had claimed the right to dispose of. In my opinion those costs ought, whether they were incurred before or after the bankruptcy, to be allowed to the bank as mortgagees, because they were expenses incurred by them in defending their title to goods on the credit of which

(*w*) Owen v. Crouch, 5 W. R. 545; and see Doe d. Holt v. Roe, 6 Bing. 447; 4 Moore & Payne 177.

(*x*) Ex p. Carr—*Re* Hoffman, 11 Ch. D. 62.

(*y*) Ibid. at pp. 65, 66.

(*z*) Ibid. at p. 66.

they had advanced their money. . . . A mortgagee has a right to assume his mortgagor's representation of his title to be true, and to take any reasonable proceeding for defending his title and asserting the validity of his security." (*a*)

So, also, as is pointed out by Lord Hardwicke in Godfrey v. Watson (*b*), "A mortgagee shall not be allowed for his trouble in receiving the rents of the estate himself, but if an estate lies at such a distance from the place of his residence as he must have employed a bailiff if it had been his own, he shall then be allowed such sums as he has paid to a bailiff to receive the rents of this estate." A mortgagor will be allowed all such costs, charges, and expenses as have been paid by him, by way of salary, commission, or otherwise, to an agent for collection of rents or management of the mortgaged premises, if the premises are of such a nature that such disbursements would have been reasonably made by him in respect thereof, had the same belonged to him absolutely (*c*); but the mortgagee cannot by any form of contract procure for himself a commission for his own care and trouble in managing the mortgaged estate (*d*).

A mortgagee may pay off any prior incumbrances upon the mortgaged estate, and add to the amount of his mortgage claim such sum as was necessarily expended by him for that purpose (*e*).

It is to be observed that the costs of completing the relation of mortgagor and mortgagee do not stand on the same footing as costs incurred in defending or realizing upon the security. Thus, although it is proper for the mortgagee to pay for the valuation of the property, made at the time when the mortgage security is first accepted, and also to pay for searching the title to the property and the preparation and registration of the mortgage instrument, and to deduct the

(*a*) Ibid. at p. 67; as to costs of asserting the validity of his security, see Ramsden v. Langley, 2 Vern. 536.

(*b*) 3 Atk. 518.

(*c*) Union Bank v. Ingram, 16 Ch. D. 57.

(*d*) Barrett v. Hartley, L. R. 2 Eq. 795.

(*e*) Teeter v. St. Johns, 10 Gr. 92; Mutual Life Assce. Society v. Langley, 33 Ch. D. 460.

same from the mortgage moneys advanced by him (*f*); yet if the mortgagee pays his own solicitor for these services, and does not so retain them out of the moneys advanced, he will not be able to afterwards treat these moneys as part of his mortgage claim and charge them upon the mortgaged property (*g*). The solicitor for a proposed mortgagee cannot recover his fees, connected with the mortgage transaction, from the proposed mortgagor, where the negotations fail by reason of a defect in the title, although it be proved to be the practice for the proposed borrower to pay the expenses of the proposed lender (*h*).

Where a negotiation for a mortgage goes off, even through the default of the proposed mortgagor, the solicitor of the proposed mortgagee cannot recover his costs from the proposed mortgagor, in the absence of an express contract on the part of the latter to pay him. He must look to the person who retained him, leaving the latter to seek his remedy against the person who occasioned the fruitless expense (*i*).

"Where there is a negotiation for a loan on mortgage and the proposed lender objects to lend the money upon investigation of the title of the borrower, he cannot be sued by the borrower for the costs attending the investigation. Nor can the attorney of the proposed lender sue the proposed borrower for those costs." (*j*)

But where the matter goes off by reason of the borrower changing his mind, he by breaking his agreement to borrow puts the lender to expense, and he must pay the costs occasioned to the lender by such breach of agreement (*k*).

On the ground that the effect of an equitable mortgage by deposit is to raise an implied contract on the part of the mortgagor that his interest in the property shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in the mortgagee,

(*f*) See Wilkinson v. Grant, 18 C. B. at p. 320; Ex p. Challinor—*Re* Rogers, 16 Ch. D. 260; 19 Ch. D. 98; Hamilton v. Charnic, 7 Q. B. D. 319.

(*g*) See Gregg v. Slater, 2 Jur. N. S. 246; 22 Beav. 314.

(*h*) Rigley v. Dayken, 2 Y. & J. 83.

(*i*) Wilkinson v. Grant, 18 C. B. 319.

(*j*) Per Brett, J., in Carter v. Merrion, 32 L. T. 663.

(*k*) Carter v. Merrion, 32 L. T. 663.

it has been held that in a case where it becomes necessary for him to realize upon his security, an equitable mortgagee by deposit is entitled to charge upon the mortgaged property the expenses which he has incurred in the preparation of a mortgage of the legal estate, for "if a proceeding is taken to enforce the contract against the mortgagor, those costs if properly incurred come within the rule, being costs properly incurred in attempting to enforce the rights given by the mortgage contract." (*l*)

It has been contended that the right of a mortgagee to tack costs, charges, and expenses to his mortgage claim is to be measured by the words of the contract contained in the mortgage instrument, but this is not by any means a rule of universal application. Thus we find it laid down in Dunstan v. Patterson (*m*) that "the rights of mortgagor and mortgagee depend first upon the contract between the parties; and secondly, on the practice of the Courts respecting those contracts." This view is sustained by the case of Ex p. Fewings (*n*), where it was held that costs properly incurred by a mortgagee in relation to the mortgaged property, and which the mortgagor will be compelled to pay as a condition of being allowed to redeem the property, do not necessarily constitute a debt for which an action can be maintained by the mortgagee against the mortgagor. In that case Lord Justice Cotton remarks: "It is said that the mortgagee's right in a redemption action is founded on an implied contract by the mortgagor to pay these costs, but I am of opinion there is no such contract, but as a condition of redemption that a Court of equity imposes on the mortgagor the terms of paying all costs properly incurred by the mortgagee for the purpose of protecting the estate or himself as mortgagee (*o*); and in National Provincial Bank of England v. Games (*p*) the same learned Judge says: "A mortgagee does not in terms contract for costs, but the rule is that all costs which he, being

(*l*) National Provincial Bank of England v. Games, 31 Ch. D. at pp 592-3 ; and see pp. 586-7.

(*m*) 2 Ph. 344.

(*n*) 25 Ch. D. 338.

(*o*) P. 352.

(*p*) 31 Ch. D. at p. 592.

mortgagee, properly incurs in relation to his security are to be allowed him."

One principle applied by the Courts in ascertaining what costs, charges, and expenses will be allowed to a mortgagee, is that embodied in the maxim, that he who seeks equity must do equity. Thus we find it laid down in Wetherell v. Collins (*q*) that at law after a mortgage is forfeited the estate is the absolute property of the mortgagee, and he may deal with it as his own, and if a mortgagor comes for redemption which a Court of equity grants him, it must be upon the terms of indemnifying the mortgagee against all costs arising out of his legal acts.

In addition to the questions which we have been considering, is the further question, what is the mortgagee's right in a mortgage action to recover in that action the costs of that action? It appears to be well settled that the mortgagee is entitled as of right to so recover such costs unless he has been guilty of misconduct; and that such costs are not subject to the discretion of the Court; and that the fact that the mortgagee in good faith claimed more than he was entitled to recover is not sufficient to deprive him of those costs (*r*).

If a mortgagee's costs have been improperly disallowed, he may appeal from such disallowance, notwithstanding the general rule that appeals upon questions of costs are not entertained (*s*).

A. H. MARSH.

Toronto.

(*q*) 3 Madd. 254.

(*r*) Stark v. Reid, 26 O. R. at pp. 267-8; Little v. Brunker, 28 Gr. 515; but if the mortgagee dishonestly makes an excessive claim he will be saddled with costs: Calvert v. Burnham, 6 A. R. 620.

(*s*) Charles v. Jones, 33 Ch. D, 80.

SIR JOHN HAWKINS HAGARTY.

It is now sixty-six years ago since a young and ambitious Irishman arrived in what was then known as Upper Canada to seek his fortune, a somewhat frail and delicate youth, and yet one with a keen determination to get on in the world. Few, perhaps, could then have predicted that this stripling would survive sixty-six years, and go to his grave after having filled, with honour to himself and to the satisfaction of the public, the judicial office for over forty years, and after having attained the highest seat upon the Provincial bench; yet such was to be the career of this youth. Such a life is an incentive to labour, and a proof that if a man has the right stuff in him, he can generally command success.

Sir John Hawkins Hagarty was the youth we refer to, and his surname is sufficient to identify his nationality. He was not an Englishman born in Ireland, although from his countenance one would imagine that he was by no means a pure Celt. He had probably that fortunate admixture of blood which results in the happy combination of the stability and dogged perseverance of the English character with the wit, fancy, and vivacity of the Celtic race.

Born in the year 1818, at Dublin, the son of Matthew Hagarty, an officer of the Prerogative Court for Ireland; after receiving his preliminary education at a private school, he entered Trinity College at the early age of sixteen; there, however, he could have remained but a very short time, as the year 1834 found him an emigrant to Upper Canada. A farm near Bowmanville was his first place of residence, whether bent on agricultural pursuits, or not, we cannot say; at all events, if he had any such ideas they seem to have been speedily dispelled, for the following year he proceeded to Toronto, where he very shortly afterwards took up the study of the law in the office of Mr. George Duggan, where he acquitted himself with zeal and diligence, and in five years afterwards he was duly admitted an attorney-at-law and called to the Bar of Upper Canada.

In those days Toronto was a very much smaller place than it is to-day, though it was then, as it is to-day, the chief city of the Province and the centre of its social and literary life, and the young and gifted Irishman, we may be sure, was always well received in the best society of the place, and his facile pen was often in request for those *jeux d'esprit* which added piquancy to its intellectual life, and his fancy found play in poems of no mean order.

Mr. Hagarty's somewhat delicate constitution, though in some respects a drawback, was in others a blessing in disguise, for it early enforced on him the absolute necessity of an orderly and regular life, and he thus escaped the snares which sapped and ruined the constitution of many of his contemporaries, men of much stronger physique, and thus it was that he was able, by the careful husbanding of his strength, to cope with the business which soon fell to his share. His first, and we believe only, partner in the business of the law was the late Hon. John Crawford, who afterwards died Lieutenant-Governor of Ontario; with him he carried on a most successful business, until he received his first appointment to the Bench. In the first volume of the Upper Canada Reports, p. 99, his name first appears in the reports in the case of Larned v. McRae, in 1844. In vol. 2, p. 68, we find him pitted against no less an advocate than the late John Hillyard Cameron, then already one of the leaders of the Bar; here Mr. Hagarty's argument is reported, and, though unsuccessful, it was at least ingenious and very well reasoned. Speedily his reputation must have grown, for in 1850, ten years after his call, he was created a Queen's Counsel; and in 1855 received the honorary degree of D. C. L. from the University of Trinity College, Toronto. Dennis v. Hughes (*a*) is the first case in which his name appears in the reports with his new title of "Q.C.," and in the next case of Cayley v. McDonnell (*b*) we find him leading for the defendants with Galt as junior, against J. H. Cameron, Q.C., and Vankoughnet, Q.C. In Genesee Mutual v. Westman (*c*) he is recorded as appearing for the defendants

(*a*) 8 U. C. R. 446.
(*b*) 8 U. C. R. 454.
(*c*) 8 U. C. R. 487.

and opposed to J. H. Cameron, Q.C. In a day when technicalities found more favour than they do with the present generation of lawyers, he found himself unable to satisfy the Court that a mark made with the end of a poker was a seal (*d*): but he lived to see the day when a scroll made with a pen in which was inscribed the word "seal" was held to be a sufficient sealing of a document (*e*): and a piece of ribbon fastened to the instrument without any wax or other adhesive substance, also held to be a seal (*f*).

From the time Mr. Hagarty took silk in 1850 his practice continually increased, and when, six years later, he was elevated to the Bench as a puisne Judge of the Common Pleas, he had attained a well recognized position as one of the leaders of the Bar of Upper Canada, and his appointment was hailed with satisfaction both by the public and the profession.

His colleagues in the Pleas were Mr. Chief Justice Draper and Mr. Justice Richards, both men of great legal ability. In those days it seems to have been very generally the fashion in the Common Pleas for the judgment of the Court to be delivered by the Chief Justice, and the solitary exception to that rule during the Term following Mr. Hagarty's appointment was made in the case of Helps v. Robbin (*g*), when the judgment was delivered by the newly appointed puisne. This we believe to be his first reported judgment.

The Courts in those days were mainly concerned with comparatively small matters. Five years after Mr. Hagarty became a Judge, however, a case of more than passing interest arose in reference to the escaped slave John Anderson, who had found an asylum in Canada after having slain a man who endeavoured to capture him for the purpose of returning him to his former master. Having been discovered in Canada, an effort was made to extradite him on the charge of murder, and having been committed by a magistrate for extradition, a

(*d*) Clement v. Donaldson, 8 U. C. R. 299.

(*e*) *Re* Bell and Black, 1 O. R. 125.

(*f*) Hamilton v. Dennis, 12 Gr. 325, affirmed on appeal 14th March, 1867. See *Re* Sandilands, L. R. 6 C. P. 411, 413; National Provincial Bank v. Jackson, 33 Ch. D. 1.

(*g*) 6 C. P. 53.

writ of habeas corpus was first obtained in the Court of Queen's Bench, on the return of which a motion was made for the prisoner's discharge, and after elaborate argument the motion was refused by that Court. The case created intense interest throughout Canada, and another writ of habeas corpus returnable before the Common Pleas was obtained, and a fresh motion there made for the prisoner's discharge. The case was very elaborately and ably argued for the prisoner by S. B. Freeman, Q.C., who had been called to the bar the same day as Mr. Hagarty, and had attained great distinction, particularly in Hamilton, where he resided, and in the surrounding country. He had as his junior the late Sir Matthew Cameron, then rising into fame. Henry Eccles, Q.C., appeared for the Crown. The case was decided, as is well known, in favour of the prisoner, on the ground that the warrant did not disclose any crime to have been committed for which he was liable to extradition, because the allegation in the commitment that he "did wilfully, maliciously, and feloniously stab and kill," without the words "murder" and "with malice aforethought," was insufficient. The warrant of commitment, moreover, directed the prisoner to be detained "until he shall be thence delivered by due course of law," whereas the statute directed that he should be committed to the proper gaol there to remain "until such surrender be made, or until such person be discharged by due course of law." On both grounds the warrant of commitment was held to be fatally bad, and the prisoner was therefore discharged (*h*). But pending the proceedings before the Common Pleas a habeas corpus had been obtained from the Court of Queen's Bench at Westminster, which, however, on the rule for the prisoner's discharge being made absolute by the Common Pleas, it became unnecessary to proceed with, and the power to issue such a writ in future in regard to persons in custody in Canada was subsequently taken away by statute: 25 & 26 Vict. c. 20 (Imp.).

Mr. Hagarty continued a Judge of the Common Pleas until 19th March, 1862, when he was transferred to the Queen's Bench, vice Mr. Justice Burns, deceased. There he

(*h*) 11 C. P. 9.

had as colleagues Chief Justice McLean, and for a few months Dr. Connor, who was succeeded by Mr. Justice Adam Wilson on 11th March, 1863. In 1868 he returned to the Pleas as Chief Justice, where he reigned for seven years with the two Wilsons as his puisnes. In 1878, on the death of Chief Justice Harrison, he returned to the Queen's Bench as its Chief Justice, where he remained until he reached the highest pinnacle of judicial eminence in the Province of Ontario, on the death of Mr. Spragge in 1884, when he was appointed Chief Justice of Ontario and President of the Court of Appeal, a position which he held until April, 1897, when he resigned his high office and retired from the Bench after a judicial career extending over 40 years.

Her Majesty, in the September following his retirement, was graciously pleased, in recognition of his distinguished public services, to create him a Knight of the United Kingdom.

Sir John, as has been seen, commenced his career as a common law lawyer, and, as a man naturally prefers that system of law which he best understands, so he, throughout his career, showed a marked preference for the common law. Equity jurisprudence in his earlier years was yet in its infancy in Upper Canada, and, though some of his contemporaries at the Bar devoted themselves assiduously to its study, he rarely, if ever, was seen in the Court of Chancery—unlike, in this respect, his contemporary at the Bar, the late Chancellor Vankoughnet, who seemed equally at home before a Court of law or a Court of equity. This was rather a disadvantage to him when he became a Judge, and especially when called on to hear appeals from the Court of Chancery. In those days the Court of Error and Appeal was a fluctuating body, composed somewhat on the principle of the English Exchequer Chamber. For hearing appeals from the Queen's Bench the Judges of the Courts of Chancery and Common Pleas sat, and for appeals from the Common Pleas the Judges of the Queen's Bench and Chancery sat; while for appeals from the Court of Chancery the Judges of the two common law Courts sat. It may be easily imagined, with a bench of common law Judges, that equity cases had a hard time, and some practitioners came to think, no matter how

sound a judgment might be delivered in Chancery, there was never any certainty that it would pass muster in the Court of Error and Appeal. In this connection a story was long ago current in Osgoode Hall of a smart rejoinder made by a junior already budding into fame and prominence, and who has since attained the highest position at the Bar. The subject of discussion before the Court was the equity doctrine of specific performance, and by way of administering a poser to the young barrister arguing before the Court, Mr. Justice Hagarty inquired whether if he made a contract with his tailor for a suit of clothes he could get the contract specifically performed. "Certainly, my Lord," was the somewhat unexpected reply. "How can that be?" said the Judge. "Why, my Lord, I should file a bill in the Court of Chancery, where it would be certainly dismissed, but I should then appeal to this Court, and your Lordships would be sure to reverse the judgment." Fortunately it was a case of Greek meeting Greek, and the sally was accepted in good part. The Judicature Act, with its practical abolition of so much that was dear to common law men, must have been somewhat of a trial to Mr. Hagarty.

Sir John had a great reputation for saying good things, —and, generally speaking, his wit had no touch of bitterness in it, and he often enlivened the proceedings of the Court by interjecting some jocularity. Like most of such *bon mots* they strike the fancy and amuse the hearers at the moment, but are suffered, too often, to fall into oblivion for want of some industrious Boswell to record them at the time. One or two of his jokes may be recalled. Sitting in the old Common Pleas, a horse case having been disposed of, the next case was called, when he remarked, "I suppose, Mr. M—, this may also be considered a horse case, for I perceive one of the litigants is the Mayor of Napanee." Occasionally he could be just a little wicked. When asked if he did not consider a certain gentleman noted for a rather stentorian voice, a sound lawyer, he replied, "Yes, a very sound lawyer: vox et præterea nihil." On another occasion, when the usher was about to light the gas in the Court, he remarked that the gas was quite unnecessary, as Mr. H—— (the counsel then addressing the Court) would supply all that was needed. To

a young and aspiring author who sent him a copy of a treatise on a somewhat difficult statute, he sent a note in which he said, "We ought all to feel obliged to you for endeavouring to throw light on this extraordinary piece of legislation. 'Ex fumo dare lucem' ought to have been inscribed on your title page."

To the habitué of Osgoode Hall any description of the personality of Sir John may seem superfluous, but for the benefit of posterity one may record here that he was a tall man, of dignified carriage, and always, for the last fifty years, of an apparently frail constitution. His portrait by Berthon at Osgoode Hall is a very good likeness of him as he was when made Chief Justice of the Common Pleas. His manner was generally cheery and good humoured, polite and courteous to all who came before him, whether full fledged practitioners or half-fledged students. While a good joker himself, he was always ready to appreciate the wit of others. His tall figure, slightly stooped at the shoulders, and often muffled up if the weather was at all inclement, as he marched with slow and stately gait from his house to the Hall, will no more be seen, but will not be forgotten in a hurry by those who have been so long familiar with it.

His judgments were framed in short crisp sentences, altogether free from any attempt at fine writing. He was particular himself in the choice of language, and resented the introducing of slang into affidavits and other legal documents. When a deponent, for instance, deposed that a certain proceeding had been taken for the purpose of "freezing out" somebody else, he strongly and very properly objected to such phraseology being used in affidavits. He had, however, a strange and, for a literary man, altogether unaccountable, objection to the word "whereabouts," and on more than one occasion objected to its use in affidavits. It may be that he preferred the Shakesperian form of the word "whereabout," but there is certainly abundant dictionary authority for the addition of an "s," so that even in that form it can hardly be justly open to the charge of being bad English. His voice was often pitched in rather a high key, and had a somewhat querulous tone, which rather added to the force of his humourous remarks. He was a gentleman of the old

school, and of a modest, unassuming character, never thrusting himself into prominence, and avoiding, as far as possible, anything savouring of notoriety. Even the honours which he might have justly regarded as his due he did not court, and they had almost to be thrust upon him. The fact that the late Sir John A. Macdonald was one of his early competitors at the Bar, and, we believe, a life-long friend, may have had something to do with his advancement, but certainly his conspicious merit was its main and most solid ground. Early in his career in Toronto he became both from his religious convictions and sympathies, and from the ties of a common nationality, the warm personal friend of the late Very Rev. Dean Grasett, for many years the rector of St. James's Cathedral, Toronto, and in 1849 he married his sister, by whom he had three sons, of whom two survive him. His funeral obsequies were quite in accord with his life, and in deference to his expressed wishes were conducted in the simplest manner, and attended by only the members of his family and a few of his most intimate friends. His mortal remains lie in St. James's Cemetery, Toronto, but his memory will long be treasured in the precincts of Osgoode Hall, where he was for many years so conspicuous and familiar a figure.

EDITORIAL REVIEW.

In Memoriam.

At a meeting of the trustees of the County of York Law Association held on the 27th April, 1900, it was resolved: "That the board of trustees of the County of York Law Association desire to convey to the members of the family of the late Sir John Hawkins Hagarty some expression of their sympathy with them in their recent bereavement. During his long and brilliant professional and judicial career Sir John Hawkins Hagarty inspired, in all who enjoyed the privilege of social or business intercourse with him, the highest admiration for his stainless life, profound learning, and powerful reasoning, while his never failing courtesy and his genial and unassuming kindness to every one entirely disarmed all attack from that spirit of envy which so frequently follows in the footsteps of success such as he achieved. While his judgments will live always in the body of our law as a monument to his own learning and a guide to others, his memory will long be cherished by the members of a profession of which he was such a distinguished ornament, and to none will it be dearer or more revered than to those, who, as inexperienced advocates, received at his hands that invariable consideration and encouragement which have so largely contributed to the great respect in which the Court over which he so long presided is justly held. It is with unfeigned regard and affection for his memory, and with sincere and respectful sympathy for the members of his family, that this resolution is tendered."

Changes in the English Judiciary.

The recent movement among the Judges in England began with the retirement of Lord Morris from the position of a Lord of Appeal in Ordinary, after a service of some fiftten years. He frequently sat in the Judicial Committee, and his face was therefore familiar to Canadians. He was never held to be a brilliant lawyer, but was sensible and amiable. An hereditary peerage has now been bestowed upon him. The

retirement of Sir Nathaniel Lindley from the chief seat in the first division of the Court of Appeal, which he occupied as Master of the Rolls, was a genuine surprise, as no one had ever hinted that he had outlived his usefulness. However, he had been twenty-five years on the bench, and before that twenty-five years at the bar, and is one of the very few still living who took the degree of the coif. He is, therefore, not by any means a young man. He may be justly esteemed a great judge—one who has left his mark upon the laws of England. He becomes a Lord of Appeal in Ordinary. His successor as Master of the Rolls is Sir Richard Webster, who is very well known in Canada, and was dined by the Bar in Toronto some five years ago. As Attorney-General he has by custom the right to the succession to any judicial office which falls vacant, but it was generally supposed that he would come to the woolsack very soon, so that his acceptance of the office of Master of the Rolls is also a surprise, but a very agreeable one to the Bar in England. He has been for some years not only the titular, but the actual, head of the Bar, and it is predicted that he will be as eminent a Judge as he was a counsel. Sir Robert Finlay naturally is promoted to be Attorney-General. He is a Scotsman, and that brilliant Irishman Mr. E. Carson succeeds him as Solicitor-General. It is remarkable that although only forty-seven he has already been Solicitor-General for Ireland, and now, with only seven years to his credit at the English Bar, becomes Solicitor-General for England. It may also be noted that Sir Richard Webster has been, with interruptions, Attorney-General for twelve years, the longest tenancy of the office which has been known in England.

The Costly Counterclaim.

A "counterclaim" as the name of a pleading was not known before the Judicature Act. Both at law and in equity, however, the defendant had, in a sense, in certain cases, the right to "counterclaim"—that is to make a "claim" and obtain relief "counter" to that sought by the plaintiff—in the plaintiff's own action or suit. At law there was the right to claim deductions from a contract price sued for, and the right to set off the defendant's demand against the plaintiff's.

There was a good deal of learning on the subject of set-off—what demands were properly the subject of set-off, in what kinds of actions it could be allowed, and by and against what description of persons. In equity the defendant often sought and obtained relief when the facts alleged and proved entitled him to it. A common instance was the defendant's prayer for foreclosure at the end of his answer to the plaintiff's bill for redemption. No one dreamed of calling this kind of pleading counterclaim. But ever since the Judicature Act was introduced in Ontario nine pleaders out of ten—at least—have called anything in the defendant's statement of defence which in the remotest way hinted at some relief desired by the defendant "a counterclaim"—probably confounding the technical "counterclaim," a distinct creature of the Judicature Act, with the old right to obtain some relief in the plaintiff's action. This being a free country, and modern pleadings being at the best ramshackle, unscientific rigmaroles, a man may call his pleading whatever he chooses, and be none the worse. The Chief Justice of the Queen's Bench has recently been at pains to point out that, at all events, no one should be the better in pocket because the defendant calls that a counterclaim which is not a counterclaim. It is believed that the braggart assumption of the "so-called counterclaim" has actually imposed upon many learned Judges, and that the defendant setting it up, or the plaintiff obtaining its dismissal, has frequently been allowed to tax a fat bill of costs in respect of it. The decision in Girardot v. Welton (*a*) may be regarded as a trumpet call to the Bench to awake out of sleep and be vigilant as regards counterclaiming defendants. The following propositions appear to be deducible from it:—

1. Calling a pleading a counterclaim does not make it one.

2. Where the defendant asserts a set-off exceeding the plaintiff's demand, it is not necessary in this Province to counterclaim even for the excess, for judgment therefor could and can be obtained in the plaintiff's action. *Aliter*, in England.

3. A true counterclaim is a claim by the defendant for relief which *cannot* be obtained by him in the plaintiff's action,

(*a*) 20 Occ. N. 231.

but before the Judicature Act must have been the subject of an independent action.

4. Where the judgment dismisses or allows with costs what is called a counterclaim, there is not necessarily an adjudication thereby that it is a true counterclaim; and the taxing officer is at liberty to tax just such costs as are taxable in respect of it in its true character.

This decision has now been affirmed by a Divisional Court (*b*).

County Library Associations.

A meeting of members of the County Library Associations throughout Ontario has been called for Saturday the 30th June next at Osgoode Hall, Toronto, at which meeting matters of general interest affecting the profession will be discussed, such as the advisibility of making the Law School self-sustaining or abolishing it, the election of a larger proportion of younger men as benchers, and the reduction of the annual solicitors' fees by any amount which may be paid by members of the County Law Associations to their local branches.

In order to ensure a full discussion on these points and others, it is hoped that there will be a large attendance of members of the profession both from the city and country at this meeting.

Recent American Decisions.

The Lawyers' Reports Annotated are published by the Lawyers' Co-operative Publishing Company of Rochester, New York, and are to be found (bound volumes) in the library at Osgoode Hall.

The following advance notes may be found useful or interesting:—

The rule that a carrier is charged with the highest degree of care consistent with the nature of his undertaking, as between him and his passenger, is held, in Tall v. Baltimore Steam Packet Co. (Md.), 47 L. R. A. 120, not to be applicable

(*b*) 20 Occ. N. 257.

to the matter of injuries to passengers by acts of fellow passengers or strangers, but in such cases the carrier's liability is held to arise only when it could have prevented the injury after knowledge or when it ought to have had knowledge of the threatened injury. On these principles a recovery was denied for injury to a passenger during a quarrel between other passengers who were playing cards in the smoking room of a steamboat.

The rule of a carrier that baggage will not be checked more than thirty minutes before train time is held, in Goldberg v. Ahnapee W. R. Co. (Wis.), 47 L. R. A. 221, not to be unreasonable as matter of law; and it was held not to be reasonable as matter of law to leave baggage in the evening for a train at 6 o'clock in the morning.

The theft of diamond rings from the finger of a woman asleep in a sleeping car is held, in Pullman's Palace Car Co. v. Hunter (Ky.), 47 L. R. A. 286, to give her a right of action, if the theft was due to the failure of the employees in the car to use ordinary care and watchfulness; and their negligence was held to be a question for the jury.

An application to require the plaintiff in an action for personal injuries to submit his neck to be photographed by the use of the Roentgen or X-rays was refused in Wittenberg v. Onsgard (Minn.), 47 L. R. A. 141, because the application was not seasonably made, and also because it did not sufficiently appear that the person by whom it was proposed to have the photograph taken had the requisite skill and experience to apply the rays properly. The Court raised a query as to whether science is yet sufficiently advanced to justify the Courts in taking judicial notice as an established fact that exposure to X-rays is not injurious to the subject.

The right to a mechanic's lien for the improvement of grounds by enrichment of the soil, planting flowers, shrubs, trees, etc., without making any structure thereon, except a rustic bridge of slight importance, is denied in Nanz v. Cumberland Gap Park Co. (Tenn.), 47 L. R. A. 273, where the statutes clearly contemplate that such liens shall be created only by the erection of some building.

A mechanic's lien on the buildings of a state university is held invalid in Phillips v. Rector & Visitors of the University (Va.), 47 L. R. A. 284, although statutory authority has been given to raise money by deed of trust on the property to provide for buildings, and these buildings were erected in place of one that had been destroyed by fire.

A judgment against a solvent garnishee which the plaintiff fails to collect, without any excuse, is held in Bowen v. Port Huron E. & T. Co. (Iowa), 47 L. R. A. 131, to constitute a satisfaction of the claim against the original debtor for the amount of such judgment. With this case there is a note collecting the other authorities on the effect of a judgment against a garnishee to merge or satisfy the liability of the principal debtor.

The use of public moneys of the state to pay a convict for wrongful conviction and imprisonment is held, in Allen v. Board of State Auditors (Mich.), 47 L. R. A. 117, to be a mere gratuity, subject to a constitutional provision requiring the assent of two-thirds of the Legislature for an appropriation for private purposes.

BOOK REVIEWS.

The Law Relating to Electric Lighting and Energy.—Second Edition, by John Shiress Will, Q.C. London: Butterworth & Co., 12, Bell Yard, Temple Bar, W. C.

This is a modern book upon a modern subject, the treatment of which is also modern. The first edition was published only in 1898, but the passing since of the Electric Lighting (Clauses) Act, 1899, the issuing of new Rules by the Board of Trade in September, 1899, and the recent report of the Joint Committee of the two Houses on questions relating to the acquisition of land compulsorily for generating stations and other like subjects, have necessitated a fresh publication. In England the Board of Trade have been charged by Parliament with the duty of making, and from time to time altering, regulations for securing the safety of the public from personal injury or from fire, or otherwise, and also for ensuring a proper and sufficient supply of electrical energy. The Board are authorized to grant a license or provisional order to a local authority, company or person, to supply electricity for public or private purposes within a defined area. In the introduction to this work the subject of electric lighting is treated fully in its legal aspects; and the rights and duties of undertakers and consumers to each other are set forth. Then follow the Electric Lighting Acts, with notes containing all available legal matter likely to be of use to those having to consult these Acts; and the regulations adopted by the Board. The book is well put together and thoroughly practical. It contains a valuable collection of cases—it is rather surprising to find there are so many—and the reference to these, at least, as well as the introduction, will be useful in this country.

Kelly's Draftsman: Containing a Collection of Concise Precedents and Forms in Conveyancing with Introductory Observations and Practical Notes.—Fourth Edition: By Leonard H. West, LL.D., Solicitor, and

William Austin, Solicitor. London: Butterworth & Co., 12, Bell Yard, Temple Bar, W. C.

This is a useful and very popular book. This new edition contains forms for use under the Land Transfer Rules of 1898, and other new forms which recent legislation and the exigencies of practice have suggested.

A Subject-Index to the Books in the Library of the Law Society of Upper Canada at Osgoode Hall, Toronto, on the 1st January, 1900. Compiled, under the direction of the Library Committee, by William George Eakins, M.A., of Osgoode Hall, Barrister-at-law, Librarian. Toronto: Printed for the Law Society. 1900.

The library contains 30,000 bound volumes. Of these about 12,000 are reports of cases and 2,000 statutes. Of the 16,000 other volumes, 8,000 are legal text-books and periodicals and miscellaneous works of reference for lawyers, 3,000 are parliamentary publications, and 5,000 are works of general literature. It is really a large and valuable library, of which the Province may well be proud. To make it readily available for all purposes a scientifically arranged subject-index was a necessity; and the Law Society has now provided one—the work of its efficient librarian. It is designed to be a guide to the contents of the library other than the reports and statutes. In dealing with legal text-books great pains have been taken to make it as serviceable as possible by entering each work not only under the heading of its main title, but also under such other headings as its contents seem to justify. Some text-books will be found indexed under as many as from ten to fifteen subject-heads. The plan of chronological arrangement of the books under each head has been adopted, instead of the alphabetical arrangement, according to authors, found elsewhere, and this adds very much to the usefulness of the index. The neat volume before us also contains a table of the abbreviations commonly found in law-books, and also a table of British regnal years, the value of which will be appreciated by those who are engaged in legal-literary work.

THE

CANADIAN LAW TIMES.

JULY, 1900.

UNIFORM LEGISLATION.

IN the industrial world of to-day the interests of trade and commerce are necessarily paramount, and to them are law and politics properly subservient. Yet, compared with the almost perfect agencies for carrying on the world's work which science has brought about, the administration of law still remains antiquated and unsatisfactory—to the world-master the one unprofitable servant which has hidden its talent in the earth. The business community has a right to require that the commercial law of every civilized country shall be readily accessible, easily understood, and inexpensively and promptly administered; and shall in its substance be in accordance with common sense. That the law as it exists to-day within the United States falls short in some or all of these particulars, must be frankly admitted.

With the growth of population, and the resulting extended business interests, the variances and contradictions in the general laws in force throughout the present fifty arbitrary subdivisions of the people have been increasingly in recent years found a serious menace to the commercial development of the country. For their existence the vagaries of legislatures are largely responsible, although there are other causes, both historical and political. To find a remedy for them, however, is a task which the legal profession has now undertaken with courage and not without success.

The American Bar Association was so early alive to the importance of promoting uniformity of legislation and assimilating the laws of the different States of the American

Commonwealth, that it specified this worthy object in the first article of its constitution as one of the purposes of its organization. Immediately upon incorporation it nominated a special committee on uniform state laws, and suggested that commissioners should be appointed by all the States to meet and confer from time to time with a view to common action for the advancement of the general purpose in hand.

Acting upon the invitation of the association, the legislature of the State of New York, in May, 1890, passed an Act for the appointment of commissioners for the purpose indicated. A majority of the States, together with the District of Columbia and some of the Territories, have since followed this example; so that commissioners representing nearly fifty millions of people now attend the annual meetings of the Bar Association and hold their conventions at the same time and place.

The appointment by Governor Hill of three commissioners under the New York State law above referred to was the first practical outcome of the association's efforts. The duties of these commissioners were to consider the practicability of obtaining uniform legislation throughout the country upon any subject, more especially marriage and divorce. The first conference was held at Saratoga in 1892.

Before proceeding to review the work of these state commissioners, in assisting which the American Bar Association has laboured with an untiring faithfulness beyond all praise, one may pause for a moment to note how singularly well fitted is this association for the work in hand. Composed of lawyers in active practice in the different States—many of them members of the legislatures of those States as well—and brought in daily contact with the peculiarities of the State law, compelled also to acquaint themselves with the Federal law and the laws of neighbouring States, no body of men could be more thoroughly alive to the desirability of uniform laws, or could more safely decide upon the best plan of securing them: while at the same time no body of men could possess more influence, once agreed upon a common course of action, in bringing about the desired result.

At the first meeting of the commissioners, the attention of the members was occupied largely with a general survey of the

whole field, and with the selection of subjects upon which all were agreed that a uniform statute was both desirable and not difficult to secure. These subjects were: the execution and acknowledgment of deeds; the solemnization and recording of marriages; the fixing the age of consent; jurisdiction in suits for divorce, making a co-respondent a party, and permitting re-marriage after divorce; the execution of wills; the probate of foreign wills; the abolition of days of grace; a uniform standard of weights and measures. Also were considered; forms of conveyances; forms of notarial certificates; commercial paper; mode of choosing presidential electors; and descent and distribution.

Negotiable instruments were chosen by the association as the subject of their first important work, and many reasons existed why the preparation of a general Act or Code relating to the subject should claim attention at the very earliest date. The anomalies of the various State laws had been long felt by every banker and mercantile man in the country, and increasingly as year by year the enormous volume of interstate trade, all liquidated by commercial paper, increased. Not only did the inherent importance of the subject justify the two years of unremitting labour bestowed upon it, but other reasons recommended it. If carried out as contemplated, the uniformity would go far beyond the United States, and would practically embrace the English speaking world. The road was already broken by the enactment of the Bills of Exchange Act.

Since this Act marked the first important attempt in England to codify branches of the commercial law, its genesis is worthy of passing notice. The statute is a practical enactment of Chalmers's Digest of the Law of Bills of Exchange, which was published in 1878, a second edition appearing in 1881. It was a work of great labour and research; and it is said that Judge Chalmers embodied in it the principles supported by over 2,500 decisions scattered through the reports from 1603 to 1878. In form the book was modelled on the Digest of the Law of Evidence and the Indian Codes prepared by Sir James Stephen. It may be said that without Judge Chalmers's treatise ready at hand the Bills of Exchange Act would not have been a possibility.

But it was to an accident that the law owes its origin. Some two years after Chalmers's Digest appeared, its learned author read a paper before the Institute of Bankers upon the subject of a proposed Negotiable Instruments Code. The views advocated in this paper met with so much approval among members of the Institute and of the Associated Chambers of Commerce, among whom it was circulated, that a bill was introduced into Parliament in 1881 by Sir John Lubbock, then President of the Institute, which was practically Chalmers's Digest, word for word. On its second reading it was referred to a select committee, of which Lord Herschell was chairman. A few trifling amendments were agreed upon, and upon its third reading it was sent to the Lords unaltered. In the Upper House it was again referred to a select committee, and a few amendments inserted. These were agreed to by the Commons, and the bill became a law on the 18th August, 1882.

The Bills of Exchange Act has remained the law of Great Britain for nearly eighteen years. It has been re-enacted with but few alterations in all the great self-governing colonies, as well as in forty out of the sixty or more dependencies; and it has everywhere met with approval, and has required but little interpretation at the hands of the Courts. Its excellent material and unsurpassed workmanship become only more apparent as the years go on.

Its merits did not escape attention in America. At the National Convention of Commissioners on Uniform State Laws held in 1895, a commission was named to procure the preparation of a draft of a bill based on the English statute. The services of Mr. John J. Crawford of the New York bar were retained, whose first draft was completed by the close of the year. This was printed, side by side with the English Act, with annotations to every section containing references to all decisions, comments of text writers, and the variant provisions of the statute laws of various States bearing on the particular subject. Copies were sent to all members of the bench and bar, as well as to bankers and mercantile men, and criticisms and suggestions invited. At the meeting of the conference of commissioners in August, 1896, the draft

was submitted, and after renewed criticism and discussion by commissioners from all the States, the Act was finally revised and passed.

Owing to the efforts of the American Bar Association, this code is now the law in twenty-four States of the American Union. It consists of thirty-six pages. In this moderate compass is now embraced the meaning and effect of hundreds of pages of statutes and thousands of reported decisions, now happily relegated to forgetfulness. To institute a comparison, one of the most recent text books on the subject covered by the statute, Randolph on Commercial Paper, first published in 1888, embraces three volumes, with over 3,000 pages; the Uniform Act is contained in thirty-six pages.

The American statute, while following the main outlines of the English Act, is by no means a slavish copy of it. It represents a most painstaking endeavour to codify the American law upon the subject it deals with, and to represent that law as faithfully as possible. Where the decisions of the Courts of last resort in the various States were found to be conflicting, the decisions of the Supreme Court of the United States were followed wherever applicable. In the language of the codification, an effort was made to preserve as far as possible words and phrases which had become familiar as recognized terms of mercantile law and well understood through numerous adjudications in the Courts. Altogether the work done was highly creditable to all concerned, and the completed Act met with universal approval. Mr. Arthur Cohen, Q.C., who was a member of the select committee of the Commons which framed the English Act, commended the American statute as worthy to rank beside it.

The Negotiable Instruments Law has now been adopted by twenty-three States, and by the District of Columbia. In California it passed both Houses, but failed to become law owing to the neglect of the Governor to sign it. In several other states it has been favourably reported by the judiciary committees, and its supporters are sanguine of its speedy passage. In time this branch of the law merchant will be, throughout the entire country, freed from the petty and irritating differences which brought it about that a note in

form negotiable in one State was not necessarily so in others, and which have so long been a source of annoyance and loss to the mercantile and banking communities.

How serious these differences were may be indicated in a survey—necessarily brief—of some of the peculiarities of the laws of various States. In most of the United States the effect of promissory notes is regulated by local statutes. According to many of these statutes the words "or order" or "or bearer" constitute the distinctive words of negotiability; and if the instrument otherwise conforms to the general common law requirements as to certainty of amount, time, unconditional promise, etc., it becomes negotiable. But in a number of States notes are not negotiable even if they contain appropriate words of negotiability, unless, in addition, they possess certain other elements either in form or substance. Thus, in several States, in order to be brought under the law merchant, they require to be made payable at a bank in the State where they are executed, as in Kentucky, Indiana, and West Virginia. In Kentucky it would appear that the note must be actually indorsed to and discounted by a bank in the State before it becomes negotiable. In Alabama the statute requires that the note must be made payable at a bank or private banking house "or a certain place of payment therein designated." In Missouri the words "for value received" are required, in addition to the words "or order" or "or bearer." In Mississippi the note is not negotiable unless made payable to bearer. In nearly all the States negotiable notes must, as at common law, call for the payment of a certain sum of money; but in a few this rule has been done away with, and they may be made payable in money or property, or even in labour, as in Illinois, Colorado, and Iowa.

To render the matter more perplexing, the Federal Courts refuse to be governed by the State Courts in their decisions on the subject. Notwithstanding that the National Judiciary Act of 1789 enacts that the laws of the several States, except where constitution, treaties, and statutes of the United States otherwise provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, this statute has been held not to apply to the

construction of contracts of a commercial nature,—"the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence." The result is that, even in the same State, Federal and State Courts may and do apply different constructions and give a different effect to one and the same commercial instrument (*a*).

We have thus glanced at the perplexities caused by the differences in the State laws referring to promissory notes, but other branches of law develop pitfalls quite as dangerous to those whose business extends over different States or is not confined to one. Take the simple subject of the formalities requisite to a proper and valid execution of a conveyance of lands. This is a matter of importance, because it is a very common thing among a restless and speculative community for men to own land in several States, and it may be said that a large proportion of the land of the younger States is owned by non-residents. The conveyance of course must be executed in strict accordance with the law of the State in which the land is situated. Now, in some States, a seal is required to such conveyances, and in others not; in some a scroll will suffice; in some a statutory form of acknowledgment is demanded, deviation from which invalidates the conveyance; similarly differences exist as to the notarial and other certificates. In reference to wills, the dangers are even greater, should the testator own land in different States. Some States require three witnesses, while in others two will suffice. The formalities as to presence of witnesses, etc., vary greatly. Since all these matters are governed by the statute law, and with prolific and fussy legislatures continually passing amendments, the difficulties of keeping track of over-night changes in the laws of forty-five States are practically insurmountable. In the haste in which testamentary documents are often necessarily prepared, great risks are unavoidably run by even the most careful practitioners.

Legitimacy of offspring—a subject involving questions of the greatest importance affecting inheritance—is another which the variant laws of the States involve in confusion.

(*a*) Railroad Co. v. National Bank, 102 U. S. 57.

Some States permit a father to adopt an illegitimate child by merely holding him out to the world as his own; in others a duly attested writing is required. In Pennsylvania the subsequent marriage of parents legitimatizes the offspring—but contra in New York.

The subject of marriage also exhibits a motley variety of provisions. Twenty-two States prohibit the marriage of first cousins. As to divorce, a volume would be needed to exhibit the differences of State laws. One State, South Carolina, permits no divorce, while in some of the newer States, as is well known, it is granted with a prodigality almost criminal. So universally is the evil of lax divorce laws recognized that there has been founded a National Divorce Reform League, which supports the efforts of the American Bar Association in this direction. It has even been proposed that the whole subject of divorce should be removed from the State legislatures and Congress alone authorized to legislate upon it, so as to call into existence a national divorce law. This would, of course, involve an amendment to the Federal Constitution, which is no easy task. It is agreed that, for the present at least, means more simple and easy of attainment can alone be resorted to. A practical tentative effort to remedy the evil of divergent laws in relation to the formalities attending the execution of deeds has been made in several States by their common adoption of an enactment rendering valid (so far at least as concerns execution and acknowledgment) any conveyance of land if executed in accordance with the law of the State where executed. This is the case in Ohio, Illinois, Wisconsin, Kansas, Nebraska, Louisiana, and Oregon. More than twenty States have enacted a similar provision in regard to wills. As to legitimacy, it has been proposed that, in order to secure uniformity, the law of the place of birth should govern: see Miller v. Miller (*b*), which sustains the reasonableness of such a rule. In regard to foreign wills, the proposal is to permit the issue of a probate in any State where property exists, upon filing an exemplification of the original probate, but permitting a contest within one year thereafter, all questions

(*b*) 91 N. Y. 315.

affecting lands within the State to be determined according to the law of the State.

It is expected that at the next meeting of the commissioners in August, 1900, a tentative form of an Act regulating divorce procedure will be brought up for discussion. The draft of this law, as well as one on sales of personal property, has been under consideration since 1897. Considerable work has also been accomplished, it is understood, in the direction of a uniform procedure, by the committee appointed for the study of comparative legislation relative to this subject. A uniform maritime bill of lading has been proposed; so, too, codifications of the law relating to common carriers, warehousemen, marine and fire insurance, pledges and liens on personal property, and partnership.,

Whatever doubts were entertained twenty years ago upon the general subject of the expediency of codifying English and American law, it is evident that the universal judgment of the commercial world of to-day insists that all branches of the law affecting mercantile and banking transactions shall be codified. The sentiment of the legal profession has changed greatly upon this subject within the past quarter of a century. "The ultimate fate of all law," says Mr. J. Dove-Wilson, the eminent Scottish lawyer, "is codification." Such partial codification as has taken place has been certainly successful. Commercial Codes are common to France, Germany, Austria, Holland, Italy, Spain, Belgium, and Mexico. The Anglo-India Codes cover both substantive law and procedure. As early as 1848, the law relating to bills of exchange was codified in Germany; and a voluminous Commercial Code, including the maritime law, followed twelve years later. In 1896 the whole body of law relating to private rights and remedies throughout the German Empire was enacted as a Code.

But even if an open question in England, the codification of both substantive and practice law is a matter of simple necessity in the United States, and one that cannot be long delayed. It was computed in 1892 that the reported decisions in England filled three thousand volumes. Those of the United States published since 1789 already fill nearly five thousand more, with a large addition each year. To a

profession already overworked, the outlook in this regard is little short of appalling. For this evil there is no relief short of codification. The principal objections to it have heretofore been the difficulty of drafting good codes and the fear of limiting the law-making power of the Judges, which all conservative lawyers feel to be the only safeguard of the community against the unripe efforts of legislatures.

An incidental advantage, but one of great value, is that the movement for uniformity is necessarily one for permanence in legislation; since it is evident that, to accomplish the practical result aimed at, the statute law must not only be made uniform but also kept so.

From its inception, the movement for unification has met the highest expressions of approval. The late Mr. Irving Browne hailed it as "a juristic movement, the most important since the formation of the Federal Constitution;" and declared that if the legislation recommended by the American Bar Association should be adopted by all the States it would "remove a very serious impediment to the prosperity of the country." "The present differences of laws among fifty sovereign States under present conditions are just as harmful," says Mr. Leonard A. Jones, of Boston, "in producing perplexity, confusion, and general insecurity, as it would be to have fifty different languages or fifty different metric systems."

While the general subject has not hitherto been pressed upon the attention of the Canadian people, the fact that it did not escape the attention of the framers of the British North America Act is an evidence of the thoroughness of their labours, undertaken as they were nearly a quarter of a century before any general interest was attracted to it in the United States. Section 94 of the British North America Act empowers the Parliament of Canada to make provision for the uniformity of all or any of the laws relative to property and civil rights in the three English speaking Provinces of Ontario, Nova Scotia, and New Brunswick, and of the procedure of all or any of the Courts in those Provinces. So far as known to the writer, nothing has yet been attempted under the power conferred; but it is reasonable to expect

that the experience of the older communities to the south of the border will, before many years, repeat itself among the enterprising inhabitants of the northern half of the continent. In this view any conscientious work undertaken in furtherance of the general purpose of unification cannot fail to be of interest (*c*).

WM. SETON GORDON.

New York.

(*c*) See an article on "Uniformity in Provincial Laws," in volume XIX. of the Canadian Law Times, p. 209.

CANONS OF STATUTORY CONSTRUCTION.

Almost from time immemorial it has been a settled maxim, that the law does not compel the performance of the impossible; yet, with a strange insistence, it enforces the presumption that every man knows the law, even before it is published; and further, that all the subjects of the realm are bound to construe that law rightly. How important then, in these days of ceaseless law-making and constant un-making, that the legislator, as well as the legal practitioner, should have at immediate command the leading canons of statutory construction! When the Judges themselves drew the Acts of Parliament, the public had a reasonable degree of assurance that no glaring defect would throw doubt upon their application and render difficult their interpretation. Not so, now, when the non-professional, as well as the inexperienced, thinks himself qualified to discharge the duties of legislation, and readily assumes the task of drafting the most intricate Acts.

It is a leading fixed canon of construction, that a private Act of Parliament will be construed more strictly than a public one as regards provisions made by it for the benefit of the persons for whom obtained. Lord Esher, M.R., in Altrincham Union Assessment Committee v. Cheshre Lines Committee (*a*), thus accentuates this difference: — "In the case of a private Act, which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be in their favour, because the persons who obtain a private Act ought to take care that it is so worded that that which they desire to obtain for themselves is plainly stated in it."

If the language of an Act is free from ambiguity, the Court has no other alternative than to so construe it as to carry into effect the intention of the legislature. Chief Baron Pollock thus tersely lays down the rule in Miller v.

(*a*) 15 Q. B. D. 597.

Salomons (*b*): "If the language used by the legislature be clear and plain, we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to our views of right or the contrary; we have nothing to do but to obey it and administer it as we find it; and I think to take a different course is to abandon the office of Judge and assume that of a legislator." To the like effect are the words of Willes, J., in Lee v. Bude (*c*): "I would observe, that these Acts of Parliament are the law of the land, and we do not sit here as a court of appeal from Parliament. It was once said that if an Act of Parliament were to create a man a Judge in his own cause, the Court might disregard it. That dictum, however, stands as a warning rather than as an authority to be followed. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law the Courts are bound to obey it."

However inequitable an Act may be—however repugnant to conscience or fair dealing—even a Court of equity has not the power to relieve against its express provisions. The most that can be said is—dura lex; sed lex. While it is well to bear in mind the general rule, that the language of a statute should be construed in its natural and ordinary sense, at the same time it is likewise well not to ignore the dictum of Plowden—that the law consists of two parts; of body and soul. The letter of the law is its body; the sense and reason of the law, its soul. That construction of a statute is the best, in which its language is made to harmonize with its reason.

When the meaning is doubtful, or the phraseology obscure, then it is the Court finds difficulty in construing a statute to make it available for carrying out the objects of the Legislature and for doing justice between parties. Then it is that recourse is had to those canons of construction, which by the decisions of our Courts, from time to time, have become fixed rules in our legal system. In case of doubtful meaning, the first and leading rule to be observed, in the construction of a statute, is, to read and construe it in the light of the intention with which it was framed. In

(*b*) 7 Ex. 560.
(*c*) L. R. 6 C. P. 580.

the attainment of this object aid may be afforded by examining the cause and reason which called it into existence. Assistance, too, will be rendered by recourse to the preamble. Chief Justice Dyer compared the preamble to "a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress." The rule enunciated by Blackstone should likewise be borne in mind:— "That in construing a remedial statute the Court should have reference to the mischief intended by the legislature, and should so construe the statute as to suppress the mischief and advance the remedy."

Plowden thus grouped the means by which to construe a doubtful or obscure Act — to collect the intention from the context; from the occasion and necessity of the law; from the mischief felt; from the object and remedy in view; and from what is consonant to reason and good discretion; and then making such a construction as harmonizes with such intention and the language of the Act.

In construing an ambiguous or obscurely penned statute, no safer rule can be adopted than those laid down by Chief Baron Pollock in Salkeld v. Johnson (*d*): "We propose to construe the Act of Parliament according to the legal rules for the interpretation of statutes, principally by the words of the statute itself, which are to be read in their ordinary sense, and only modify or alter so far as it may be necessary to avoid some manifest absurdity or incongruity, but no further. It is proper, also, to consider the state of the law which it proposes or purports to alter, the mischiefs which existed, and which it was intended to remedy, and the nature of the remedy provided, and to look at the statutes in pari materia as a means of explaining this statute. These are the proper modes of ascertaining the intention of the legislature." This concise epitome is modelled upon the rules laid down in Heydon's case (*e*).

That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and

(*d*) 2 Ex. 272.
(*e*) 3 Rep. 8.

considered: (1) What was the common law before the making of the Act. (2) What was the mischief and defect for which the common law did not provide. (3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. (4) The true reason of the remedy. And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief, and to add force and life to the cure and remedy according to the true intent of the makers of the Act.

In construing a statute, contemporaneous, prior, and subsequent statutes in pari materia are frequently referred to in aid of construction. Even a repealed Act in pari materia may be resorted to for the purpose of construing one of doubtful meaning. It was held by the Supreme Court of New Brunswick, in Ex p. Lugrin (*f*) in 1875, that the word "pavement," in s. 56 of 22 V. c. 8 (N. B.), was not to be understood in its technical sense, but in the sense in which it had been used in an Act relating to the same subject-matter that had been repealed, in which the legislature had defined its meaning for the purposes of that Act. A particular phrase or part of an Act, which seems obscure or doubtful, may be elucidated by viewing it in connection with other parts or the whole context. This construction of a part of a statute by reference to another part of the same statute is called the exposition ex visceribus actus. Sir John Nicholl said in referring to this mode of construction:—"The key to the opening of every law is the reason and spirit of the law; it is the animus imponentis, the intention of the lawmakers expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, the particular phrase is not to be viewed detached from its context in the statute; it is to be viewed in connection with its whole context, meaning by this as well the title and preamble as the purview or enacting part of the Act." Briefly expressed, every Act of Parliament is to be looked at in its entirety and is to be construed ex visceribus actus.

(*f*) 16 N. B. R. 127.

Courts, too, in construing a statute, look at the object aimed at, and if the language is susceptible of more than one construction, it should receive that which harmonizes with such purpose, rather than that which would tend to defeat it.

General following particular and specific words must be confined to things of the same kind as those specified. Lord Chief Justice Campbell thus concisely lays down the rule in Regina v. Edmundson (*g*):—"The general principle laid down in all the cases which have been cited is that, when particular words are followed by general words, the latter must be construed as ejusdem generis with the former."

As a corollary to the general proposition, it has been held, that when general follow particular words, they will not include anything of a class superior to that to which the particular words belong. Casher v. Holmes (*h*) affords a good illustration of this rule. By an Act of Parliament duties were imposed on copper, brass, pewter, and tin, and *all other metals* not enumerated. This action was brought to recover duties on a quantity of bar gold and bar silver. It was held that the words, "and all other metals not enumerated," did not include gold and silver, as it was an undoubted rule of construction, that things or persons of an inferior nature cannot by subsequent general words be extended to those of a superior. While the general rule is that where general words follow specific, the former take their meaning from the latter, and are presumed to embrace only things and persons of the kind designated by them; yet in cases where the specific words signify subjects greatly different from one another, the general term must receive its natural and wide meaning.

Although the title forms no part of an Act, still it may be referred to in ascertaining the intention of the Legislature. Neither the title nor preamble, however, can restrict or extend the clear meaning of the purview. Baron Channell very clearly enunciated the rule in Hughes v. Chester R. W. Co. (*i*):—"It is a well established rule that effect is to be

(*g*) 2 E. & E. 83.
(*h*) 2 B. & Ad. 592.
(*i*) 31 L. J. Ch. 100.

given to the clear words of an enacting clause, though they may go far beyond the language of the preamble, that is, that where the words of an enacting clause are clear and explicit, then their natural and obvious meaning shall not be restricted or cut down by the use of language of less extensive import in the preamble."

It has long been an established rule, that if two enacting clauses are repugnant, the last must prevail. The reason for it being, it was the last intention expressed by the legislature.

Nice questions frequently arise, whether certain enabling statutes are to be construed as obligatory or permissive. If an Act is couched in the following terms,—"it shall be lawful," etc., or, such a thing may be done,"—at first blush it would seem that these words import a discretion. It does not, however, necessarily follow that such is the correct interpretation. Very often they are to be construed as imperative. This prima facie permissive language becomes imperative or obligatory when the thing to be done is for the public good or for the sake of justice. The Queen v. Bishop of Oxford (*j*) affords a good illustration of this rule. By the Church Discipline Act, 3 & 4 V. c. 86, s. 3, it was enacted, that in case a clerk in Holy Orders is charged with an offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against said laws, it *shall be lawful* for the Bishop of the Diocese within which the offence is alleged to have been committed, on the application of any party complaining thereof, or if *he shall think fit*, of his own mere motion, to issue a commission under his hand and seal to five persons, etc., etc., for the purpose of making inquiry as to the grounds of such charge or report. The Court held that this Act did not confer a mere discretion on the Bishop, but imposed an obligation to proceed on complaint properly made for violation of the Act. At page 258 of the case referred to, Chief Justice Cockburn is thus reported:—"So long as the year 1693 it was decided in the case of The King v. Barlow (*k*)

(*j*) 4 Q. B. D. 245.
(*k*) Salk. 609.

that when a statute authorizes the doing a thing for the sake of justice or the public good, the word 'may' means 'shall;' and that the rule has been acted upon to the present time." It has likewise been held, that when a statute confers an authority upon a Court or Judge to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application. See Macdougall v. Paterson (*l*).

While it is a settled canon of construction, that "may" means "must," where the legislature seeks to impose a positive duty; yet it is otherwise, if the intention is evident to give a discretion. In Lane v. Gray (*m*) application had been made to the Court for the production of certain documents under s. 18 of 15 & 16 V., in which the power was permissive; yet it was refused, on the following grounds given by Vice-Chancellor Sir R. Malins:—"I think, therefore, there is a discretionary power vested in the Court to order production when it shall appear to the Court to be right to do so. It seems just and reasonable that the Court should not order persons in possession of an estate to produce their documents of title to every one who may claim, and who, perhaps, may have no foundation for the claim."

How far a permissive statute will enable one, in the execution of the power granted, to disturb the common law rights of another, provided in its execution he has not been guilty of negligence, has undergone careful consideration in a recent case before the Privy Council: Canadian Pacific R. W. Co. v. Parke (*n*). Briefly summarized, the facts were these. The Legislature of British Columbia authorized the defendants to irrigate their soil by the diversion of water from an adjacent stream, by conveying it over lands which did not belong to them, subject to provision for compensation. The soil which the defendants irrigated proved to be of a very porous quality, consisting of a sandy loam resting upon gravel, which in turn rested upon silt, a mineral that

(*l*) 11 C. B. 755.
(*m*) L. R. 16 Eq. 552.
(*n*) [1899] A. C. 539.

absorbs water rapidly. The percolation of the water through this silt caused the land to slide, which kept moving towards the Thompson river, along the banks of which runs the line of the Canadian Pacific Railway, thereby causing injury to the track. The appellant company brought an action for an injunction to restrain the defendants from continuing to bring water upon their lands, and to allow such water to escape to the plaintiffs' line of railway, and to cause the land slides thereon as mentioned. The trial Judge, Drake, refused the injunction craved, and dismissed the appellants' action with costs—holding it a case of damnum sine injuria. On appeal, the full Court of British Columbia affirmed the judgment of the trial Judge. They held that the defendants' irrigating the surface of their land, by bringing to and pouring upon it foreign water, which immediately percolated to the substratum of silt, with which it mingled, and then escaped from their land as liquid mud, and seriously damaged the adjoining land, was the necessary consequence of their exercising their statutory right, and did not constitute negligence, or afford the owner of the adjoining land any cause of action. The House of Lords allowed the appeal, reversed the judgment of the Court of British Columbia, and granted an injunction restraining the respondents from so irrigating their lands as to cause a land slide or slip, and thereby to injure the appellants' railway. Lord Watson in delivering the judgment of their Lordships said:—"Wherever, according to the sound construction of a statute, the legislature has authorized a proprietor to make a particular use of his land, and the authority given is, in the strict sense of the law, permissive merely, and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law rights of others. . . . The real question, therefore, in this case comes to be, whether these provisions ought to be construed as being in their substance, as well as in their form, permissive merely, and subject to the obligation, which in that case is implied at common law, that the irrigator must use his water supply so as not to do damage to adjacent lands; or whether they are to be so construed as imperative, and therefore as empowering the irrigator, so long as he is not convicted of

negligence, to inflict any amount of injury upon his neighbour without incurring responsibility. . . . Their Lordships have been unable to discover, in the statutory provisions submitted to them, any sufficient ground for holding that the privilege of irrigating his own soil with foreign water was meant by the legislature to be imperative, and was intended to exclude all right of action by neighbouring proprietors for injury done to their lands, save in the case where such injury was occasioned by the negligence of the irrigator."

St. John, N. B. SILAS ALWARD.

(To be concluded.)

EDITORIAL REVIEW.

Appeals from the Divisional Courts.

We find it necessary to refer once more to the question whether an appeal lies from the judgment of a Divisional Court of the High Court of Justice for Ontario to the Supreme Court of Canada. A new light is thrown upon the case of Farquharson v. Imperial Oil Company, by the publication in June last of the opinions of the Judges (*a*). The decision on the merits of the appeal was given on the 24th October, 1899, and Mr. Justice Taschereau's views upon the question now before us seem to have been then orally given. But we now find that after the decision of the merits, judgments on the question of jurisdiction were, to quote the report, p. 201, "handed down," and we now have the whole case before us. The action was begun in the High Court; it was dismissed at the trial by the Chancellor; and the plaintiff appealed unsuccessfully to a Divisional Court (*b*). Wishing to carry the case farther, and there being no appeal to the Court of Appeal, by s. 77 (2) of the Judicature Act, R. S. O. c. 51, without leave, and leave having been refused by the Court of Appeal, the plaintiff applied to the Registrar of the Supreme Court of Canada for leave to appeal direct to that Court. The Registrar refused the motion, but on appeal from the refusal to Mr. Justice Gwynne, in Chambers, the leave was granted, the security for the proposed appeal was approved, and the appeal was allowed.

Mr. Justice Gwynne distinguished the case of Danjon v. Marquis (*c*), upon the ground that the present case rested upon legislation subsequent to the judgment in that case, and held that the Legislature of Ontario had jurisdiction to make one Court the Court of final resort within the Province of Ontario in one class of cases, and another Court the Court of final resort in another class of cases, and that

(*a*) 30 S. C. R. 188.
(*b*) 29 O. R. 206.
(*c*) 3 S. C. R. 251.

was what had been done, and therefore the judgment of the Divisional Court was a final judgment of the highest Court of final resort within the Province of Ontario in the particular case under consideration, within the meaning of R. S. C. c. 135, s. 24 (*a*). He also thought that special leave to appeal could and should be granted, if it were necessary.

The defendants then made a motion by way of appeal from the order of Mr. Justice Gwynne. The Court, composed of Strong, C.J., Taschereau, Gwynne, Sedgewick, and Girouard, JJ., dismissed the motion upon the spot, expressing no opinion on the right of appeal, but holding that leave to appeal having been granted by a Judge in Chambers, his discretion would not be reviewed.

After the appeal had been heard, upon the merits and allowed by a Court differently composed, the members of the Court who had heard the motion by way of appeal from the order in Chambers announced (we suppose) to the Registrar their views upon the question of jurisdiction.

The Chief Justice was of opinion that there was no jurisdiction to grant leave to appeal except by virtue of s. 26, s.-s. 3, of R. S. C. c. 135, providing for an appeal, by leave, from the final judgment of any Superior Court in a cause commenced therein without any intermediate appeal, but that the jurisdiction to grant leave under that section still remained, notwithstanding the Provincial legislation making a Divisional Court a co-ordinate appellate tribunal with the Court of Appeal, and the case was a proper one for such leave.

Mr. Justice Taschereau was strongly of opinion that no appeal lay either with or without leave; that the Judge in Chambers had no jurisdiction to grant leave; and that the appeal should be quashed. In this Mr. Justice Sedgewick concurred.

Mr. Justice Gwynne adhered to his former opinion.

Mr. Justice Girouard concurred in the dismissal of the appeal from the order in Chambers.

Mr. Justice King seems to have concurred in the judgment allowing the appeal, and therefore could not have been of the same opinion as those who held it should be quashed.

Mr. Justice Taschereau's opinion, though reported as if delivered only upon the motion by way of appeal from the order in Chambers, is in fact a judgment dissenting from that of the majority of the Court allowing the appeal. Mr. Justice Sedgewick concurs in the reasoning, but he was not one of the Court which heard the appeal.

The actual fact, apart from perplexing cross-currents of opinion, is that four of the six Judges composing the Court have agreed in entertaining an appeal from the judgment of a Divisional Court, under the circumstances mentioned, and they will presumably do the same again, if leave can be obtained. Perhaps the necessity will not arise very often, for it must be remembered that leave to appeal to the Court of Appeal can be obtained in such cases, and also that the uncertainty drives most of the important cases direct to the Court of Appeal. Perhaps, too, legislation may be devised to make the matter plain.

The Meaning of a Proposition.

Save thee, friend, and thy music: dost thou live by thy tabor?
No, sir, I live by the church.
Art thou a churchman?
No such matter, sir; I do live by the church: for I do live *at* my house, and my house doth stand *by* the church.

TWELFTH NIGHT, ACT III., SC. 1.

The question whether "at," as used in a certain contract, meant "into" or "near to," recently occupied the attention of a Divisional Court (*a*). The plaintiff agreed to deliver a quantity of coal for the use of the defendants "at the coal shed." The defendants refused to accept such part of the coal as was not placed in the shed, but was left where it was landed upon a dock not far away. The trial Judge was of opinion that the primary meaning of "at" was "near to," and that it was used in that sense in the contract. The decision of the case turned upon a question of fact and not upon grammatical nicety. The Chancellor expressed the view, however, that "at" means rather within a place than without. The word "by," as used in the quotation above, and in the phrase "hard by," has exactly the meaning which the trial Judge strove to put upon "at," and the distinction between "by" and "at" is neatly marked.

(*a*) Holmes v. Town of Goderich, 20 Occ. N. (current) 303.

Exemplary Damages.

The following question and answer were given and received at an examination of law students not long ago:—

1. "Damages may be nominal, ordinary, or exemplary." Explain the nature of each and state when each will be awarded, giving examples.

Exemplary damage is where one is given where a man has lost in one transaction on account of another electing to do one of two things which he had a right to do but his electing to do one would be an injury to the other party who could only succeed against one of two things, as, where one man has a right to be paid a sum out of two different lots and another man has only a right to receive out of one of the lots now if the first can get satisfaction out of the larger one of the lots, he must do so rather than take out of both and by so doing deprive the other one of his right to get full satisfaction, if he does take out of both the other can get exemplary damages from him.

A Remarkable Letter-Head.

A correspondent calls our attention to an extraordinary printed heading to a letter received by him. It is matter for regret that a fac-simile of it cannot readily be produced. However, it conveys the information that the writer, whose name is printed in enormous letters, is police magistrate for one of the ridings of an important county in Ontario, a notary public, a conveyancer, and manager at ——— for a firm of solicitors (names given in full) practising at the county town. Perhaps the solicitors, whose names are well known in the community, have not seen this startling advertisement of their "manager."

Versatile Barristers.

There were some remarkable circumstances in connection with a case recently tried at the Central Criminal Court, London. The prisoner, a young woman, was charged with the murder of her new-born child. She was defended by two counsel. The senior had practised as a physician before coming to the bar, and so successfully used his medical knowledge in cross-examining the doctor who was called for

the prosecution, that the latter was brought to say that he was not certain the child had ever had a separate existence, whereupon the prisoner was acquitted. The junior counsel, who was a Baptist minister as well as a barrister, then married her to her lover!

Recent American Decisions.

Bicycles are held, in Taylor v. Union Traction Co. (Pa.), 47 L. R. A. 289, not to be within the meaning of an ordinance giving vehicles a right of way upon street-railway tracks, in the direction in which the cars usually run, over vehicles going in the opposite direction, so as to entitle a bicyclist to the right of way over a vehicle approaching from the opposite direction. With this case is an extensive note on bicycle law.

To constitute duress it is held, in Galusha v. Sherman (Wis.), 47 L. R. A. 417, that threats need not be such as are reasonably necessary to control by fear the free will power of a person of ordinary firmness and courage: but the question in each case is said to be: Was the person so acted upon by the threats as to be bereft of the quality of mind essential to contract.

A judge whose wife is a stockholder in a corporation is held, in First National Bank v. McGuire (S. D.), 47 L. R. A. 413, to be disqualified to sit in a cause in which the corporation is plaintiff, although there are no statutory provisions of the subject, and in that State a husband is not directly interested in the property of a wife during her lifetime.

A breach of promise of marriage is held, in Sanders v. Coleman (Va.), 47 L. R. A. 581, to be excused when, without any fault on his part, the prospective husband has developed a grave malady of such a character that marriage might endanger his life or health.

A right of action by a wife against another woman for the alienation of her husband's affections is denied in Houghton v. Rice (Mass.), 47 L. R. A. 310, if such alienation is not accompanied with adultery.

An infant who has bought a bicycle on the instalment plan is held, in Rice v. Butler (N. Y.), 47 L. R. A. 303, to be under obligation to account for its use and for deterioration in its value while in his possession, if he rescinds the purchase.

The disaffirmance of a conveyance by an infant is upheld in Bullock v. Sprowls (Tex.), 47 L. R. A. 326, without restoring the consideration received for the property, when it is not in his possession or control upon arriving at full age, but has been dissipated by him while still a minor.

BOOK REVIEWS.

Principles and Practice in Matters of and Appertaining to Conveyancing, by John Indermaur, Solicitor. London: George Barber (Furnival Press).

Mr. Indermaur, who is, we believe, a successful "coach," as well as a practising solicitor in London, has now produced a companion volume to his "Principles of Common Law" and "Principles of Equity." The main purpose is to lay before students, in a concise and convenient form, matters appertaining to conveyancing. It is not a first book for students, but a second one, and it is built upon such lines as to be of very considerable use to persons actually engaged in conveyancing.

English Common Law in the Earlier American Colonies, by Paul Samuel Renisch, PhD., LL.B., Assistant Professor of Political Science in the University of Wisconsin. Madison, 1899.

A scholarly thesis on an important and interesting subject.

CORRESPONDENCE.

Hardships of the Assessment Law.

To the Editor of THE CANADIAN LAW TIMES.

SIR,—A. purchases in 1898 a small house, subject to a mortgage, liability in respect of which it is agreed he is not to assume. A. rents the house to B. for $8 a month, the lessor to pay the taxes. In making the assessment for 1899 the assessor for the city of Toronto places B.'s name under the heading "name and post office address of taxable party" in the assessment paper, marks him as exercising Mf. (manhood franchise), and places A.'s name under the heading "name and address of owner when person named in column 2 is not the owner." On the 1st May, 1900, the principal and interest under the mortgage becoming in arrear, the mortgagee requires B. to attorn to him, and a monthly tenancy is created between them. The tax collector for the city now threatens to distrain B.'s goods for the taxes of 1899. The house is not worth the mortgage claim. Is the mortgagee to lose a part of the rent for 1900 because B. is obliged to pay these taxes for 1899 which A. should have paid, the corporation having failed to levy within 14 days after the taxes became due, as required by s. 135 of the Ontario Assessment Act?

Yours truly,

MORTGAGEE.

Toronto, 25th May, 1900.

THE

CANADIAN LAW TIMES.

AUGUST, 1900.

THE DEVOLUTION OF ESTATES ACT.

Notwithstanding the numerous decisions (*a*) which have been given during the last fourteen years upon questions arising under the Devolution of Estates Act, and the volumes that have, during that period, been said, thought, and written upon the subject, there are, it seems to us, various points in connection with it which may still be profitably discussed.

On the whole, we think the opinion of the profession inclines to the view that the Act has worked satisfactorily, and that the conjecture of the learned Chancellor of Ontario that "when its far-reaching consequences are properly apprehended, it may be found that the absorption of realty by personalty tends to systematize jurisprudence in much the same way as the absorption of law by equity" (*b*), seems on a fair way to realization.

But, although the original Act has now been in force for nearly a decade and a half, and the professional mind has become in great measure familiarized with the altered conditions of real property law wrought by it, still it cannot, we think, even yet be said that the subject is entirely free from misapprehension.

(*a*) The more important of these may be found collected in convenient form in Messieurs Bicknell & Kappele's recent work, "The Practical Statutes of Ontario," at pp. 631-633. We notice, by the way, the omission of one important ruling, viz., that the widow on election is entitled (when there are children) to an absolute one-third in the realty, and not merely a third for life: Re Reddan (1886), 12 O. R. 781.

(*b*) Re Reddan (1886), 12 O. R. 781.

We might refer, in this connection, to what seems to us a singular misconception which appears in the work of a learned writer on the subject.

In Mr. A. T. Hunter's useful and carefully executed compilation on "The Real Property Statutes of Ontario," at p. 283, we find the following:

"Who, then, is the real representative of the property of persons dying since 1st July, 1886? Taking all the above mentioned provisions as consistent, we may say that (1) during one year after the owner's decease, in the first place, the Judge of the Surrogate Court is the real representative; then, the position shifts to the personal representatives, i.e., persons to whom probate or administration is granted; and (2) after one year from the owner's decease, the real representatives are the personal representatives, if they file a caution; or if they do not file a caution, then the position shifts to "the devisees or heirs beneficially entitled thereto."

We take it that when the learned writer says, "Who, then, is the real representative of the property," etc., he means the question to be the same as though he had said "in whom is the legal estate in the property vested," etc., and similarly that when, lower down, he says, "the position shifts to the personal representatives," he means that the legal estate so shifts.

If we are correct in this understanding, the statement seems to imply that on the death of an owner (1) the legal estate in the realty immediately vests in the Judge of the Surrogate Court of the county within which the land is situated; (2) that on the expiry of a year from the death, such estate shifts to the personal representatives (i.e., the persons to whom probate or administration has been granted); (3) that, having so shifted, the legal estate, in the absence of registration of a caution, immediately (presumably after a moment of time) again shifts to "the devisees or heirs beneficially entitled thereto;" (4) that in case a caution has been registered, the legal estate remains in the personal representatives for one year from the registration of the caution, and thereupon shifts to the devisees, etc., as aforesaid.

If the above is a correct exposition of the doctrine the learned writer meant to propound—and we can gather no

other meaning from the words used—then we confess that, with all possible respect for the learned writer's opinion, we cannot help feeling persuaded that his view of the position is in this instance very far from being accurate. In fact, it seems to us that were any lawyer to endeavour to carry on his practice on the basis of the law being as there laid down, he would speedily find himself involved in difficulties and contradictions innumerable.

Put shortly, the inaccuracies in the statement seem to us to be as follows:

1. The legal estate in the realty of a deceased owner does not, as we understand it, vest in the Judge of the Surrogate Court under any circumstances.

2. The idea that the personal representatives (as above defined) are obliged to await the expiry of a year from the death before becoming invested with the legal estate is erroneous. They become so invested immediately on the issue of probate or letters of administration.

3. The idea of the legal estate shifting *to* the personal representatives is quite foreign to the spirit or purpose of the Act (except in so far as it is brought back to them under certain conditions by the registration of a belated caution under R. S. O. c. 127, s. 14).

4. The period assigned by the learned writer as that at which the legal estate shifts *to* the personal representatives, is precisely that at which, as we understand it, such estate, in the absence of a registered caution, shifts *from* them.

The idea of the legal estate shifting from the Judge of the Surrogate Court as Real Representative has no place in our jurisprudence. No change by shifting or otherwise of the domicil (if we may be allowed the expression in this connection) of the legal estate can have any effect on the status of the Judge of the Surrogate Court as Real Representative. He is just as much the "real representative" of land within his county after the expiry of a year from the death as before. We shall refer further to this branch of the subject directly.

Subject to correction, we should be inclined to answer the question put by the learned writer, viz., "Who is the real

representative of the property of persons dying since 1st July, 1886?" as follows. Until probate or letters of administration have been granted by the proper Surrogate or other Court, there is no real representative (in the sense in which the personal representative becomes such after the issue of probate or letters of administration). The legal estate in the land in the interim is in abeyance or "in gremio legis" or "in nubibus," as the learned writers on real property law are wont to express it (*c*).

Immediately on the issue of letters of administration or probate within one year from the deceased's death, the legal estate vests in the administrator or executor to whom the letters of administration or probate have issued.

At the expiration of one year from such death, in the absence of registration of a caution under the Act, the legal estate shifts from the personal representative to "the devisees or heirs beneficially entitled thereto."

If a caution is registered, the shifting is thereby prevented, and the legal estate remains in the personal representative until the expiry of one year from the registration of the last caution (when it shifts as aforesaid) or until the conveyance within that period by the personal representative, when it follows such conveyance.

The question will be asked, "Where, then, does the Judge of the Surrogate Court come in?" To this we should be inclined to reply—again subject to correction—that he does not, in this connection, come in at all!

In other words, the Judge of the Surrogate Court was never in the same category with the heir-at-law, (prior to the Devolution of Estates Act), or the personal representative (since that Act), as the person in whom the legal estate in the realty vested after the decease of the owner; that is to say, although certainly by statute created "Real Representative" of all land of deceased owners within his county, the Judge of the Surrogate Court was never constituted the real

(*c*) "This enactment (the Devolution of Estates Act) produces a highly anomalous state of affairs upon the death intestate of the owner of land; for during the period between his death and the appointment of an administrator, the land is absolutely without an owner:" Armour on Titles, 2nd ed., p. 295.

representative of such land in the sense in which the heir-at-law or personal representative would be the real representative thereof at the respective periods mentioned.

"What then," it will be asked, "is the meaning of the Act 20 V c. 65 (Can.), which provides as follows:.

"Whereas it frequently happens in cases of persons dying intestate leaving real estate in Upper Canada, that by reason of the absence therefrom or of the minority of some of the parties entitled to participate in the succession to such real estate, no title can be made to the same without great delay, expense, and inconvenience, and it is desirable to provide some remedy therefor: Therefore Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. The Judge of the Surrogate Court in each of the counties or unions of counties in Upper Canada, having jurisdiction within such county or union of counties, shall be the "Real Representative" for all real property within such county or union of counties, in respect of or to which any person, being seized of or entitled to an estate in fee simple therein, shall die intestate."

This enactment, without the preamble, is continued, with verbal alterations, in R. S. O. 1897, c. 123, s. 4 (the Partition Act). Mr. Hunter, it will be observed, apparently takes it that, by reason of this provision, all real estate in Ontario vests, on the decease of the owner, in the Judge of the Surrogate Court of the county in which the land is situated.

We do not think that is, or was intended to be, the effect of the Act. In fact, we might go further and say we do not think the legal estate in any land ever vests in the Judge of the Surrogate Court in virtue of his character of "Real Representative."

Our understanding of the enactment in question is as follows: The office of "Real Representative" was created as part of the machinery of the Partition Act. It is true the Legislature gave to the incumbent of the office the name of "Real Representative," but it did not, we take it, thereby, mean to provide that he should occupy the position which had formerly been occupied by the heir-at-law, or that he

should possess powers over the realty analogous to those possessed by the personal representative over the personalty.

The title "Real Representative" was merely a designation of the office, and might equally well have been "Real Grantor" or "Real Conservator," or any indifferent name, so far as any efficacy could be taken as residing in the title to confer powers in relation to the realty. That is shown, we think, both by the fact that the Legislature uses capital letters for each of the words and places the designation in inverted commas, as well as by the whole tenor of the Act (*d*).

Our view is that from the clause quoted alone the Judge of the Surrogate Court derives no powers whatever. The creation of the office was merely a preparation for what was to follow: and to ascertain what powers, duties, or general attributes attached to the office, it becomes necessary to examine the subsequent provisions of the Act.

Turning to s. 26, the intermediate sections having provided for sale of the realty by direction of the Court in the customary manner under the Partition Act, the special powers and duties of the "Real Representative" become apparent. That clause provides that "an order shall be made directing the Real Representative to execute deeds pursuant to such sales, and such deeds so executed . . . . shall be a bar both in law and equity against all parties interested in the premises who shall have been named in such proceedings as parties, and against all unknown parties when notice was published as aforesaid, and against all persons claiming under or through them, and also against all incumbrancers where the notice hereinbefore mentioned has been given to them."

As we understand it, it is by virtue of this clause alone that the conveyance of the real representative derives efficacy.

(*d*) The statute, moreover, is careful to retain the capital letters wherever mention of the Real Representative subsequently occurs. It is quite true that the revised statute (R.S.O. 1897 c. 183, the Partition Act), which is the development of the original Act now under discussion, discards the capitals—greatly to the impairment of the artifice of the enactment. But then we must remember that we live in a highly progressive age, when there is no time for fine distinctions, and when "utility," as typified by the saving of a small amount of space and printer's ink, is the one thing of paramount importance. Even a bishop's wife must be content nowadays to appear in print as "Mrs. (Rev.) Jones."

It is nowhere said that the legal estate shall vest in him, nor is it (though the question is not very material to the present discussion, as the Judge's power over or connection with the estate only arises in those very exceptional cases where proceedings are taken under the Partition Act) by reason of any such vesting, that his deed becomes efficacious.

The position rather is, that when certain necessary formalities have been complied with, through the medium of the Court, power is conferred upon the Real Representative to execute a conveyance which shall operate by force of the last mentioned clause of the Act to convey the legal estate to the purchaser.

Until the necessary preliminary steps have been duly taken the Surrogate Court Judge has, as we understand it, absolutely no power over or connection with the land.

In support of this view, it is worth while referring to the difficulty which so often arises in an action or matter before the Court by reason of there being no existing representative of the real estate of a deceased landowner who could be made a party.

No one, we apprehend, ever heard it suggested in such a case that a simple method of getting out of the difficulty would be to make the Judge of the Surrogate Court a party as being the Real Representative of the land in question.

We might refer in this connection to the words of Mr. Justice Robertson in Malone v. Malone (*e*): "I am of opinion now since the Devolution of Estates Act that these devisees are not proper parties; at all events they are not necessary parties. The estate in the lands has devolved to the personal representatives of the person who died seized, and for all purposes of this action they are the proper parties defendants."

The office of "Real Representative" is somewhat of a relic of antiquity. Since the introduction of the simple and convenient procedure under the Rules of the High Court, the cumbrous and expensive procedure under the Partition Act is rarely adopted. In fact, any solicitor adopting it does so at the risk of receiving a reprimand from any High Court

(*e*) 17 O. R. 103.

Judge before whom the case may come for not having followed the simpler course.

The introduction of the doctrine of the "shifting" of the legal estate and the registration of cautions (by 54 V. c. 18) was, we think, a wise and much needed step. It was no doubt the outcome of the hardship felt and complained of by heirs and devisees on its appearing that one effect of the Devolution of Estates Act was to entail upon them the necessity of procuring a conveyance from the personal representative of their deceased ancestor or testator before they were properly invested with the title to their land.

The change has undoubtedly resulted in the saving of much expense to property owners, and has, we think, met with the general approval of the profession.

The language used in introducing the reform in question is somewhat peculiar. It is as follows (s. 1): "Real estate not disposed of or conveyed by executors or administrators within twelve months after the death of the testator or intestate shall at the expiration of the said period be deemed to be vested in the devisees or heirs (or their assigns as the case may be) without any conveyance by the executors or administrators, unless," etc.

The choice of this language does not seem to be altogether happy. What, for instance, is the meaning of saying that real estate shall be "deemed" to be vested?

The province of the Act was to vest the real estate in the beneficiary after the twelve months: if "shall be deemed to be vested" is intended (as we think it undoubtedly is) to be equivalent to "shall be vested" or "shall thereupon vest" it seems a pity that the simpler and more direct form of expression was not adopted. Were any other meaning intended by the words used, the Act would have failed of its purpose.

The object intended to be effected being the transfer of the legal estate in realty from one person to another, it would seem that the words employed should be as explicit and appropriate to that purpose as the words of a conveyance or vesting order.

Perhaps we may be pardoned, moreover, if we venture the opinion that the Act might possibly have been moulded in even a more beneficial form than that in which it appears on the statute book—a form, indeed, which, as it seems to the writer, would have gone farther towards carrying out in its entirety the idea which was in the legislator's mind.

The policy of the law upon the subject as reflected in the Act was evidently to adopt in the case of realty the same period for administration as had theretofore been customary in the case of personalty, allowing to an executor or administrator twelve months to administer the estate, and then providing for the transfer of the land to the beneficiaries in the absence of any special reason for retaining it longer in the personal representative's hands.

That policy would seem to be an eminently wise and proper one. The personal representative should have some definite period within which to look about him and provide for the due administration of the estate before being divested of any portion of the property devolving, and the adoption, in fixing that period, of the obvious analogy between the cases of realty and personalty would seem to be natural and reasonable.

Grounds of general precaution are sufficient to require the allotment of some reasonably lengthy period for consideration and action to persons placed in a fiduciary position, such as that of executor or administrator. Our remarks, therefore, must not be understood as indicating an advocacy on our part of any automatic shifting of the legal estate within the period of one year from the death under any circumstances. But the very fixing of a limit at that period is of itself a declaration that grounds of general precaution are not a sufficient warrant for depriving beneficaries of their property beyond that limit.

It is properly assumed that by the time personal representatives have had an estate in their hands twelve months they will have a tolerably accurate idea as to whether it will or may become necessary to have recourse to the lands for payment of debts, etc., and only in case the personal representatives then deem that they cannot yet safely part with

control of the lands, are the beneficiaries to be longer deprived of their property.

Would it not then seem reasonable to suppose that if the only two recognized grounds for depriving the beneficiaries of their property, viz., (1) general precautionary considerations which require the estate to remain under the control of the personal representatives for twelve months, and (2) the belief of the personal representatives that recourse to the realty may be necessary after the expiry of the twelve month period indicated by the registration of a caution, are eliminated, the general spirit of the enactment would require that the property vest forthwith in the beneficiary?

Accordingly, it seems to us that the Act would have more effectually carried out the idea of the legislature had it provided that as soon as neither of the above mentioned reasons for non-vesting should be found to stand in the way, the property should forthwith vest in the beneficiaries.

As the Act stands, the property does not and cannot so vest. The period of vesting is twelve months from the death, or, if a caution is registered within that time, twelve months from such registration, or the last of such registrations, in case additional cautions are registered.

Take a simple case. An executor, as the period of expiration of twelve months from his testator's death approaches, feels doubtful whether he may not require the land to pay debts. To be on the safe side, he registers a caution. In a few weeks, but after the expiry of the twelve month period, he finds that the land will not be required, and withdraws the caution. What reason then exists for depriving the beneficiary of the legal estate in the land for nearly twelve months longer? And yet under the Act as it stands he is so deprived, as far as the automatic shifting of the estate is concerned.

It seems to us that the statute would more effectually accomplish its object if it provided that in case of the withdrawal of a caution the land should vest in the beneficiary, either at the expiry of one year from the death, or in the event of that period having already expired, forthwith on such withdrawal. Indeed, one may almost go further and

say that it must have been the intention of the legislature that the land should so vest, else why the provision for withdrawal of cautions at all?

At present that provision is of no effect. It accomplishes nothing and is absolutely of no utility. The beneficiary cannot, under any circumstances, obtain his land any sooner by reason of the withdrawal of a registered caution, nor can anyone benefit or be affected by it in any way. It may well be doubted whether, if a caution is registered and withdrawn, even within the period of twelve months from the death, the legal estate can shift at the expiration of such twelve months.

It would seem that it could not, inasmuch as the provision appears to be absolute that where a caution is registered the period of vesting shall be twelve months from such registration. And yet it would seem rather absurd that the mere fact of a caution having been registered within twelve months from the death should postpone the vesting for another twelve months where the person registering the caution has himself declared (by withdrawing the caution) that when the first period for vesting—twelve months from the death—arrives, no reason exists why the vesting should not take place.

In another respect, also, the language of the Act and of various kindred Acts relating to the same subject is open to considerable uncertainty of construction.

It will be observed that the original statute (49 V. c. 22, R. S. O. 1887, c. 108), in enacting the new scheme of devolution of undisposed realty, avoided the use of the word "heirs." The enactment is, that such property "shall be distributed as personal property not so disposed of is hereafter to be distributed."

The intention was to assimilate the distribution of realty and personalty.

The object and effect of the Act was virtually to do away with "heirs" altogether. It would hardly be correct to say that the effect of the Act was merely to alter the law of descent, and that the persons who take the lands on an intestacy after the passing of the Devolution of Estates Act

take it as "heirs" of the intestate just as much as the persons who would have become entitled on an intestacy prior to the Act.

The rationale of the Act seems to be, that the persons who become entitled to the realty under an intestacy take it as personalty—as distributees, not heirs—the Act operating a constructive conversion, and the fact that if there are no debts, the beneficiaries may elect to call for a conveyance in specie does not, we conceive, alter that position, as they would in such case take the land in the same proportions as they would, as distributees, have taken its proceeds in the event of a conversion, not in the proportions they would have taken as heirs under the old law.

The Act itself seems to corroborate the view suggested, s. 10 (R. S. O. 1887 c. 108) providing that "in the interpretation of any statute of this Province or in the construction of any instrument to which the deceased was a party or in which he was interested, his personal representative for the time being shall be deemed in law his heirs and assigns unless a contrary intention appears."

If that is the true view of the matter, it will be seen that the Act upon which we have just been commenting (54 V. c. 18) reads somewhat oddly. Its provision (s. 1) is that real estate not disposed of, etc., within twelve months, etc., shall be deemed thenceforward to be vested in the devisees or etc.

It will be observed, therefore, that the Legislature still treats "heirs" as having a definite existence.

When, moreover, the provision above referred to, constituting the personal representatives the "heirs and assigns" (*f*), is borne in mind, it will be seen that the difficulty becomes none the easier of solution.

Practical difficulties, in the case of a measure working such radical changes in the law as the Act under discussion, were virtually certain to arise.

(*f*) By the Act in its present form, R. S. O. c. 127, s. 10, the personal representatives are to be deemed the heirs, the words "and assigns" being omitted.

A remedy for one of the more important of these was furnished by 56 V. c. 20, s. 2, now R. S. O. c. 127, ss. 14 and 15, which provides for the registration of cautions after the expiry of a year from the death.

In regard to s. 15 (of the Revised Statute), while the intention of the enactment is apparent, there seems to be room for very grave doubt as to what the strict legal effect of the words used may be. The object to be attained by the enactment was the revesting of the legal estate in the personal representative, from whom it had shifted.

The words used for this purpose are as follows: "Such caution . . . . registered . . . . shall have the same effect as a caution registered within twelve months from the death of the testator or intestate, save as regards persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees or some of them, and save also," etc.

Are these words sufficient to revest the legal estate in lands in the personal representative?

It will, of course, be conceded that the Legislature is invested with ample power to transfer the legal estate from one person to another.

But must it not also equally be conceded that the accomplishment of that purpose absolutely requires the use of appropriate words of conveyance? It is not sufficient that the intention can be gathered from the Act. The legal estate will not bow to intention. It will not move until it moves perforce by virtue of certain appropriate words operating upon it.

The words used are that the registration of the belated caution shall have the "same effect" as a caution registered within the twelve months.

It therefore becomes necessary to inquire what is the effect of a caution registered within such period. Its effect, and its only effect, so far as we understand the matter, is to prevent the legal estate, which is at the time vested in the personal representatives, from passing out of them. It does not effect any transfer of the legal estate. Its operation is merely preventive.

The registration of the belated caution (i.e., a caution registered after the expiry of the twelve month period) is by the Act to have the same effect.

How can it possibly have the same effect? The legal estate has passed out of the personal representatives, and is vested in the persons beneficially entitled. It is therefore too late to prevent that transfer of the legal estate. It has already taken place. What is now required is something which shall have efficacy to transfer the legal estate from the beneficiaries back to the personal representatives.

But we have already shown that the caution (registered within the year) is not and never was a transferring agent. Its effect is merely negative, not positive. Active transfer of the legal estate is entirely foreign to its essence.

By what peculiar process of reasoning, then, are we to arrive at the conclusion that the exhibition (to borrow a term from our medical friends) of a non-transferring agent can have the effect of creating an active transfer of the legal estate from the party in whom it then resides to another?

So far as analogy will hold, its effect should be just the contrary. The registration of the timely caution prevents the legal estate from leaving its then domicil, retains it in the person in whom it then resides. To have the "same effect," the registration of a belated caution should cause the legal estate to remain where it is then vested, which would be just the opposite effect of that intended by the Act.

The present enactment seems somewhat like providing that the closing of the stable doors after the horse is gone shall have the same effect as closing them before that event, or that the receipt by the sheriff of a criminal's reprieve the day after the execution shall have the same effect as such receipt the day before the same. The mischief has already been done, and quære whether it is not too late for a simple provision of that kind to set it right?

A further point which seems to us to be one of much importance and to deserve careful consideration is this:

On the expiry of a year from the death (no caution registered) the legal estate vests in the beneficiaries. On the subsequent registration of a belated caution it revests (assuming the words used in the Act to be efficacious) in the personal representatives, "save as regards persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees or some of them."

Quære, under this provision, what is the position of the wives of the heirs or devisees in whom the estate vested at the expiry of the year, in respect of dower?

The dower of these wives would undoubtedly attach immediately on the husbands (the heirs or devisees) becoming seized at the expiry of the year. Is this inchoate right to dower an interest which must be taken to fall under the provision mentioned by the Act as "rights acquired for valuable consideration from or through the heirs or devisees" and as such expressly excepted from the revesting, or, if not, can it also be extinguished by the words used in the Act?

The point is worth thinking about. Our impression is that up to the present time it has been customary in the profession to accept conveyances from the personal representatives, who have omitted to register cautions within the year, upon its being made to appear that a belated caution has been legally registered, and that no actual conveyances have been made or incumbrances created by the heirs or devisees.

The practice may, we think, yet possibly prove to be a dangerous one, but its prevalence at all events furnishes one further evidence of the amiability and complaisance of our profession, which has in this instance, up to the present time, so far as this branch of the Statute is concerned, cheerfully consented to take the will for the deed (*g*).

One other remark may be made before closing, though the discussion of the question involved would be too lengthy to be admissible here.

(*g*) We venture to suggest that in all such cases it will be found to be only an act of proper prudence to insist on a release from the wives of the heirs, etc.

It is, that the Act, effecting as it does so radical a change in our law, will almost certainly be found to impinge upon established doctrine at various quite unexpected points. One such occurs to us at the moment. It relates to the law putting a widow to her election between her dower and a provision made for her by will.

Interesting questions, it seems to us, may, under given conditions, be raised as to what effect, if any, the altered law in respect of a widow's dower interest may have upon the established doctrines in that behalf.

F. P. BETTS.

London, Ontario.

CANONS OF STATUTORY CONSTRUCTION.

(Concluded.)

It is a well recognized canon of construction, that every statute which impairs existing vested rights, imposes a new obligation, creates an additional duty, or attaches a disability hitherto unknown, operates prospectively and not retrospectively. Yet if, by express words or by necessary implication, it appears that the legislature clearly intended it should have a retrospective effect, the Courts are bound so to construe. Willes, J., in Phillips v. Eyre (*o*) says:—"Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law." In a leading American case, Calder v. Bull (*p*), this rule of law is thus summarily enunciated by Chase, J.:—"Every ex post facto law must necessarily be retrospective; but every retrospective law is not an ex post facto law. Every law that takes away or imposes rights vested agreeably to existing laws is retrospective and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect."

The presumption, however, against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts. In fact, with respect to the latter, the converse of the general rule obtains. It may be laid down as a settled principle of law, that all statutes merely for the purpose of regulating procedure are held retrospective, unless there is some good reason or other why they should not be. Blackburn, J., clearly defines the rule in Kimbray v. Draper (*q*):—"The canon of decision in

(*o*) L. R. 6 Q. B. 23.
(*p*) 3 Dallas 386.
(*q*) L. R. 3 Q. B. 162.

Wright v. Hall (*r*) is, that when the effect of an enactment is to take away a right, prima facie it does not apply to existing rights; but where it deals with procedure only, it applies to all actions pending as well as future."

When a statute grants power for the performance of some act and prescribes the manner in which it is to be done, the enactment is either absolute or directory. If absolute or imperative, it must be fulfilled exactly. On the other hand, if directory, it may be fulfilled substantially. If absolute and contravened, the Court will treat that which has been done under it as void; but if merely directory, the thing which has been done will be held valid, whether fully complied with or not. It is difficult to lay down a general rule by which to determine when an enabling statute is obligatory and when directory. The dictum of Lord Penzance in Howard v. Bodington (*s*) may be followed as a safe guide in assisting to determine this question:—I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory." Mr. Sedgwick, in his excellent work on statutory law, considers that the practice of disregarding statutes, by treating them as merely directory, has been carried beyond the line of sound discretion. That learned author, however, admits that a strict compliance with all the minute details of modern statutes would, if even possible, work much injury, and for this reason, and to carry into effect the intention of the legislature, Judges are tempted not to enforce strictly all provisions contained in statutes, but to treat them, without doing violence to the language, as being merely directory. Notwithstanding the difficulty in such cases, in the absence of a general rule, there are certain guides which will afford material assistance in reaching a fairly correct conclusion as to the proper interpretation of statutes of this kind. One is, according to Lord Campbell, to ascertain the real intention of the legislature

(*r*) 6 H. & N. 227.
(*s*) 2 P. D. 211.

by carefully regarding the whole scope of the statute to be construed.

Another is, to regard very often the various steps to be taken in carrying an Act into effect as mere prescribed formality, and therefore directory; but what is of the essence of the Act as imperative, and therefore obligatory.

It has also been held that when an Act confers a right, privilege, or immunity, or grants a power subject to the observance of certain conditions and regulations, a strict compliance is required, and omission thereof is held fatal to its validity. On the other hand, if the Act relates to the performance of a public duty, the directions for carrying it into effect, not being of the essence of the object sought, seem generally to be regarded as mere instructions, and the neglect of their strict observance does not involve legal invalidity.

Matters of procedure, too, by public officials, are deemed directory, and strict compliance with all the provisions of the Act is not indispensable to the validity of the proceedings.

Where a statute confers on a Court of justice authority to hear and determine a matter, or enables a person to take legal proceedings under specified circumstances, the mode of procedure is mandatory and must be strictly complied with, otherwise all done under it will be utterly void.

In determining whether the words of a statute are imperative or directory, the Court has the power to take into consideration the question of convenience. In Regina v. Ingall (*t*) the question was, whether the provisions of a statute which directed the overseers of a parish to deposit a valuation list of ratable property before the 1st June, and transmit it to the assessment committee, were directory only or imperative; if the latter, the subsequent proceedings would be void. Lush, J., in delivering judgment, said:—"We must, in construing an Act, strike a balance between the inconvenience of holding the list to be null and void, and the risk of allowing injury to be done by the delay in

(*t*) 2 Q. B. D. 199.

making the list; the former seems to me the greater evil, and therefore, in my opinion, we ought to hold the list to be valid."

Ex p. Danaher (*u*), a New Brunswick case, carried on appeal to the Supreme Court of Canada (*v*), affords a good illustration of the principles referred to. By s. 27 of the Liquor License Act, 1887, of New Brunswick, it was provided, that applications for licenses to sell liquor in the city of Saint John were to be taken into consideration at a meeting to be held by the mayor, "not later than the first day of April in each year." The meeting directed by this section to be held was not held until the 26th April. It was contended that licenses granted by the mayor after the 1st April were null and void. The Court of New Brunswick held, that s. 27 of the Act was directory as to the time of holding the meeting—the mayor being a public officer, in the discharge of a public duty—and that the licenses granted on or after the 26th April were legal. This judgment was affirmed on appeal to the Supreme Court of Canada. Chief Justice Sir John C. Allen, in his judgment in the Court below, after pointing out the consequences that would result from declaring the licenses null and void granted by the mayor on or after the 26th April, further said:—"That there would be no law in force, in the city, to punish persons for selling without license; and that that state of things must continue until the 1st of May in the following year, leaving the city in the meantime without any power to regulate and control the liquor business; a condition which would be lamentable in the extreme. In Maxwell on Statutes, p. 340, it is said that the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative; and Lord Campbell uses similar language in Regina v. Mayor of Rochester."

No branch of the subject of statutory construction has been more fruitful of controversy than that of a liberal construction of an Act as contrasted with its strict construction. By a liberal construction of an Act is meant, that its words should receive the broadest and most extensive

(*u*) 27 N. B. R. 554.
(*v*) 17 S. C. R. 44.

meaning of which they are susceptible. According to Lord Kenyon, it is a settled rule, in expounding remedial statutes, to extend the remedy as far as the words will admit. Lord Mansfield defined it as doing all that could consistently be done in advancement of the remedy with any construction of the Act. In his judgment in Dover Gas Co. v. Mayor of Dover (*w*) Turner, L.J., observed:—"We must, consequently look at the particular provisions of the Act on which the question before us immediately depends, with a view, not indeed to strain the construction of the language of the Act, but, where the words are open to doubt, to give them a construction which may advance the objects of the Act."

A strict construction of an Act does not mean giving its words the narrowest meaning of which they are susceptible. It means, however, a close adherence to the letter of the statute; yet not such a forced and strained meaning as will defeat the intention of the legislature. Chief Baron Alexander in Attorney-General v. Jefferys (*x*) said:—"Something has been said about the different rules of construing statutes with reference to their being remedial or penal. That is certainly a distinction of some consequence where the question of construction comes to a measuring cast: but where the language of an Act of Parliament is clear and plain, I am bound to give it effect. I am not at liberty, upon a suggestion that this is a penal Act, to detract from the plain meaning of the language used by the legislature, and to narrow and restrict the provisions which, in my opinion, they have unequivocally made."

The following are among the principal cases which, many say, demand strict construction: Acts in derogation of the common law; Acts which impose penalties; Acts which change the common law rules of evidence and the law concerning the competency of witnesses; Acts which confer a new jurisdiction or derogate from the jurisdiction of a Superior Court; Acts which encroach on personal or property rights of individuals; Acts which affect vested rights; Acts which impose taxes or other burdens upon the public, or create exemptions from common law liabilities;

(*w*) 7 De G. M. & G. at p. 555.
(*x*) 13 Price at p. 580.

Acts which confer power to take private property against a man's will; Acts which confer a right to sue or which impose liabilities which did not exist at common law, or create new or special jurisdictions; Acts which authorize the sale of lands for non-payment of taxes; Acts which authorize summary proceedings; and Acts which delegate powers.

According to Chief Baron Pollock, an interpretation clause, declaring that one thing shall mean another, ought to be construed strictly: see Allsop v. Day (*y*).

Story, J., held, in United States v. Dickson (*z*), that where an enacting clause, which is general in its language and objects, is followed by a proviso, the proviso must be construed strictly.

Certain text writers, notably Hardcastle and Sedgwick, seem disposed to hold the rules of liberal and strict construction as somewhat vague. Sedgwick, in his work on statutory law, says:—"The Judges have perpetually taken refuge in the clouds and mists of strict and liberal interpretation, whenever they have been pressed by the hardships or injustice of a particular case, and, as Lord Hobart said in Sheffield v. Ratcliffe, Hob. 346, if you ask me by what rules the Judges guided themselves in diverse expositions of the self-same word and sentence, I answer: it is by that liberty and authority which Judges have over statute laws according to reason and best convenience to mould them to the truest and best use."

We have already seen that if two Acts are contrariant, the prior is repealed by the subsequent, by implication. If, however, the prior is a special Act, and the subsequent general, the rule does not apply. It was held in Corporation of Yarmouth v. Simmons (*a*) that where there are provisions in a special Act which are inconsistent with the provisions of a prior general Act, the provisions of the general Act must yield to those of the special Act.

(*y*) 7 H. & N. at p. 463.
(*z*) 15 Peters at p. 165.
(*a*) 10 Ch. D. 518.

The following rules of construction should be indelibly impressed upon the mind of the legal practitioner.

1. An Act must be construed according to the ordinary and grammatical sense of the language, and according to the apparent intention of the Legislature, to be gathered from a consideration of its title, preamble, recitals, as well as all the provisions of its purview. It should be borne in mind that, while the preamble may extend, it cannot restrain, the effect of the enacting clause.

2. The words of a statute should be construed so as to give a sensible meaning to them, if possible—ut res magis valeat quam pereat.

3. All statutes passed for the public good or convenience should be construed, if possible, to compass the end proposed; or, in other words, should be expounded largely, and not with restrictions.

4. Private Acts conferring special powers, particularly if they affect the rights and property of others, should be construed strictly.

5. One part of a statute should be construed by another, for the meaning of the legislature can in this manner be best ascertained. This is called an exposition ex visceribus actus.

6. If there are several Acts upon the same subject, they are all to be taken together as forming one system, and as interpreting and enforcing each other.

7. Technical words in a statute must receive their technical meaning, unless there is something in the context which indicates a contrary intention.

8. In expounding a statute, reference to the time when, and the circumstances under which, it was enacted, is one of the best and surest methods of interpretation. Courts, however, refuse to take into consideration anything that happened in Parliament during the passage of the Act.

9. The decision of a competent tribunal, in the construction of a statute, soon after its enactment, is entitled to great weight. Contemporanea expositio est optima et fortissima in lege. According to Sir Edward Coke:—"Great "regard ought, in construing a statute, to be paid to the

"construction which the sages of the law who lived about "the time or soon after it was made, put upon it; because "they were best able to judge of the intention of the makers "at the time when the law was made."

10. When the language of a statute is doubtful, evidence of usage is admissible in aid of its construction. The acting under a statute, in a particular manner, for a number of years, is entitled to great consideration in ascertaining the proper constructon to be put upon its provisions which seem open to doubt or that are obscure in their meaning. Optimus legis interpres est consuetudo.

11. It is an undoubted rule of construction, established by a long line of authorities, that, where several words preceding a general word point to a confined meaning, the general word shall not have such a meaning as to extend its effects beyond subjects ejusdem generis. This rule is thus concisely stated by Pollock:—"It is a general rule of construction that, where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters ejusdem generis" with such class.

12. It is a general rule, that no statute shall be construed so as to have a retrospective operation, unless it is clearly shown by express words that such was the intention of the Legislature.

13. A statute, however, relating to procedure is retrospective. And further, a statute is retrospective without express words, where it is intended to remedy an existing evil, and in order to do so gives to the parties injured a new remedy.

14. Acts which infringe upon the legal rights of the subject must be expressed in language clear beyond all reasonable doubt.

15. When the provisions of an earlier Act are so inconsistent with, or repugnant to, the provisions of a later Act, that the two cannot stand together, the former is repealed, by implication. Leges posteriores contrarias abrogant.

16. A general Act does not repeal or affect a prior special Act without express words of reference.

17. If there is an inconsistency between a general Act and a subsequent special Act, the latter must prevail.

18. If a statute creates a new right and gives a particular remedy for enforcing it, there is no other remedy.

19. A statutory obligation, which can be enforced by an action at law, is not a proper subject for the exercise of the prerogative writ of mandamus.

20. It is an established rule of construction, that permissive language in an Act, tending to promote the public good, is held to be compulsory. Likewise when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise it when the occasion arises.

21. Whether the provisions of an enabling statute are to be construed as imperative or directory, depends largely upon its import and general scope. If enacted for individual benefit, all directions prescribed for carrying it into effect are strictly construed; on the other hand, if for the public good, the Courts rest satisfied with a substantial compliance with its provisions, especially such as direct public officials in carrying out its provisions.

22. The words "may" and "it shall be lawful," being permissive or enabling words according to their natural meaning, become obligatory, when the object for which the power is conferred is for the purpose of enforcing a right. A duty, in such a case, is cast upon the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf to do so.

St. John, N. B. SILAS ALWARD.

EDITORIAL REVIEW.

Changes in the Ontario Bench.

Early in July some important changes were made in the judiciary of Ontario. Sir George Burton retired from the presidency of the Court of Appeal, and the Chief Justice of the Queen's Bench was elevated to that position, while Mr. Justice Falconbridge became Chief Justice of the Queen's Bench. As yet no appointment has been made from the Bar to the vacant puisne Judgeship in the Queen's Bench Division.

Sir George Burton.

The retirement of Chief Justice Burton, after more than a quarter of a century upon the Bench, was not unexpected. Though not by any means feeble either mentally or physically, Sir George is well entitled by age and services to the privilege of spending the end of his days in comparative repose. Not entirely in repose, for it is understood that he has consented to undertake the duties of arbitrator between the Dominion and one of the Provinces in regard to an important matter in dispute. The retiring Chief Justice has always been a great favourite with the Bar, and we believe with the public also. His undoubted learning, impartiality, and devotion to his judicial work, no doubt, entitled him to the confidence and respect of the community, but his absolute sincerity and never-failing courtesy, in public and private, were alone sufficient to give him a high place in the hearts of his countrymen. "A great judge and good man" might be said of him as well as of one of his predecessors. As a Judge we venture to think that he was strongest in commercial law, but there is hardly any subject which has not in the twenty-six years during which he sat in the Court of Appeal been illuminated by his clear exposition and sound application of the principles of law.

Chief Justice Armour.

The Court of Appeal will continue to be a strong Court. In the new Chief Justice of Ontario—who makes a personal sacrifice in accepting the position—we have the very man required to keep it up to its proper standard—a lawyer without a superior in knowledge of case law and with an established reputation as a Judge both in term and at *nisi prius*. He is the oldest Judge on the Bench, having been appointed in 1877, and it is fitting that he should become the head of the Provincial judiciary. As President of the Court of Appeal he will, no doubt, display the same energy in the dispatch of business which has characterized him in the Court below. We hope to see some vigorous measures taken to clear off all arrears.

The New Chief Justice of the Queen's Bench.

Mr. Justice Falconbridge, who succeeds to the position of President of the Queen's Bench Division of the High Court, with the title of Chief Justice of the Queen's Bench, has been a judge for thirteen years. His promotion, we have reason to believe, is popular with the bar. He has marked administrative ability, is dignified and courteous, the possessor of sanctified common sense—a safe and a sound Judge.

The Vacant Judgeship.

The manner in which the appointment of a new High Court Judge is being discussed is nothing short of scandalous. Unfortunately it has leaked out that the position was "offered" to a gentleman who at first was inclined to accept, but ultimately declined it. This should have been kept a profound secret. Now, if street gossip and newspaper reports are to be believed, an undignified scramble for the office is going on and is likely to go on until after the general elections. From the stand-point of the Bar, there are but a few men in Ontario who are thoroughly qualified for the highest judicial offices, and of these few there are some who, it is well understood, would not accept, at present at least, a seat upon the Bench. This would really narrow the constituency to a very small knot of men, not one of whom would himself seek the office. The public stand-point is in effect the same. But then there are the politicians!

Large Jurisdiction of Inferior Courts.

An extraordinary case (*a*) is reported from a Division Court in the county of Hastings, Ontario. The plaintiff recovered judgment for $167 principal and $158 interest upon a promissory note made in 1882, the defendant having all the time been, and still being, absent in Dakota, and the debt not having been kept alive by payments or otherwise. In addition to this, the note had been lost, and secondary evidence of its contents was given, which the Judge held established not only the liability of the defendant, but also his signature for the purpose of ascertaining the original amount, which was more than $100, and thus bringing the plaintiff's claim within the increased jurisdiction of the Division Court.

Judges Interrupting Counsel.

In responding to the toast of the Judges at a recent Mansion House dinner the new Master of the Rolls, Lord Alverstone, better known as Sir Richard Webster, said, that the task of the Judge was difficult in steering a mid-course between the cross-examining spirit which incessantly interrupted counsel, and the absolute silence which refrained even from asking a question which might serve to elucidate a difficulty.

The Meaning of Ordinary Words.

Lord Halsbury, in a recent after-dinner speech, said he had been called upon as a judge lately to discuss what was a place, and more recently to decide what was a coach, and within the last two or three weeks he had been called upon to discuss what was a house. The great criterion of human knowledge now—the man in the street—would no doubt at once find an answer to those three questions, but he could assure them that it had taken the highest legal tribunal considerable time to unravel the answer in each instance.

(*a*) Murphy v. Sweeney, 20 Occ. N. 338.

Rebellion Losses.

In Steenkamp v. Kyd (*b*) Sir Henry de Villiers in 1898 gave a judgment which will be of importance as a precedent in the near future. The case arose out of some small but treasonable disturbance; and the Court ruled that "a person who conspires with others to wage war against the Queen, and joins them in appointing a leader to conduct the war, is civilly responsible to individuals for damage done by the orders of such leader, if such orders might have reasonably been anticipated as a consequence of the conspiracy."

The Workmen's Compensation Act.

The House of Lords has lately settled two points of great importance under the Workmen's Compensation Act. In the one case (The Main Colliery Company v. Davies) it was held in effect that a man may be 'dependent' on the earnings of his son, who met his death under circumstances entitling him to claim compensation under the Act, though he is in receipt of full wages and maintaining himself, if the son's wages formed part of a common fund for the support of the family. In the other (Powell v. The Main Colliery Company) it was laid down that the 'claim for compensation' which the statute requires a workman to give within a prescribed time in case of injury is satisfied if within the statutory time limit an intimation specifying the fact of injury and the claim, and amount of claim, for compensation is given to the employer; and that it is not necessary that proceedings should within the statutory limit be instituted before the tribunal which is competent to assess the compensation.

The Value of the Written Judgment.

The following is from the Solicitors' Journal of the 30th June last:

"We are sorry to observe that the new Master of the Rolls has departed, in one particular, from the example of his predecessor; and that in the recent important case

(*b*) 15 Cape Reports 221,

Re Dixon, Heynes v. Dixon, he delivered his reserved judgment extempore, instead of reading from a manuscript. Lord Justice Collins followed this intiative; but Lord Justice Rigby was faithful to the written judgment, which was first introduced, if we are rightly informed, by the late Lord Justice Kay, and has now been for some years the regular practice followed in the Court of Appeal. The reporter can assert, we suppose, no claim on judicial consideration, though his task of taking down even ordinary judgments in a court which is generally buzzing with whispered conversation, and from the lips of judges who are not always careful to deliver their oracles slowly, or even with ordinary distinctness, is already difficult. But we wish respectfully to protest against the practice of extempore reserved judgments on other and wider grounds. Reserved judgments, it is evident from their very nature, frequently have to deal with and decide intricate questions of law; and it is necessary, in grappling with subtle points of law, that judges, in order to make themselves clear, should express themselves in language of precision. It is so easy to say just too little or just too much; to make havoc by the careless introduction of unnecessary words of long settled legal principles; to forget to guard oneself by laborious limitation and distinction from misapprehensions which are perilously easy. Yet language of precision, we venture to believe, is almost impossible to extempore speakers. Certainly the shorthand notes of extempore judgments offer no inducement to revise this opinion. Such judgments, when exposed to the searchlight of the shorthand note, are often found to be straggling, ragged, and amorphous, to abound in verbose repetitions and innumerable verbal inelegancies. They are also sometimes open to the weightier objection, that they are full of unintelligible propositions and serious logical inconsequences. The judge, we do not doubt for a moment, has got a clear conception of the exact bearing of his argument; but it does not follow that he is able to state it offhand with corresponding exactitude. Now what is the position of the reporter? Often, indeed, he seems to see dimly, under a turbid torrent of words and phrases, the reality of the central conception. Is it his duty, using language of preci-

sion, and working out at leisure ideas and principles which the bench has endeavoured to express in a hurry, to correct a phrase here, to develop an argument there, and generally, in short, to recast and remodel what he conceives to be the underlying argument? Whether he be justified in so doing, or not, it is certain that he ought not to be called upon to do it. We hope most sincerely that the example of Lord Alverstone in Re Dixon will not be taken as a precedent."

In Ontario the debt which we owe to the Judges in not only stating their opinions in writing, but in very many cases stating the facts to which their opinions apply, has frequently been acknowledged.

BOOK REVIEWS.

The Yearly Digest of Reported Cases for the Year 1899, decided in the Supreme and other Courts in England, and a copious selection of reported cases decided in the Irish and Scottish Courts, and lists of cases digested, overruled, considered, etc., and of Statutes, Orders, Rules, etc., referred to. Edited by Edward Beal of the Middle Temple, Barrister-at-law. London: Butterworth & Co.

This is a comprehensive and well-arranged digest. The head-notes of which it is made up are very properly compressed into small space, but the pruning-knife has not been used with the head-lines or catch-words, which are too numerous and out of proportion to the head-notes. This, of course, does not affect the usefulness of the book from the stand-point of the person consulting it. One regrets merely that it is not so concise as it might be. The titles and sub-titles are for the most part those with which we are familiar. "Local Government," including (among others) cases relating to public health, drainage, and sanitary matters, is new, but is fully justified. The printing is excellent.

Studies in Private International Law, by Émile Stocquart, D.C.L. Brussels: Veuve Ferdinand Largier.

This brochure, published in Brussels during the present year, and written by Dr. Stocquart, the well-known editor of the French edition of Dicey's Law of Domicil, will prove to be an interesting adjunct to the more theoretical works of Story and others. It consists chiefly of an outline of the law of marriage and divorce in the various countries of Europe, and a discussion of what is required in the law of each country as to capacity and form. It also discusses the conflict of laws and the rules laid down in each country as to the validity, or otherwise, of marriages contracted or divorces obtained elsewhere. While it is a practical manual, there are to be found certain paragraphs containing old time learning. For example, we are told that as far back as the 1st March, 1665, a code of laws known as "The Duke of York's Laws" was promulgated at Hampstead, Long Island, in America, civil marriages being adopted,

to be performed by a justice of the peace. The laws made for the government of the colony of New York, amongst other things, provided that: "Where no church or meeting place shall happen to be, a publication in writing shall be first fourteen days before marriage upon three doors of each parish whereof the partyes Inhabit (vizt) one on the Constables, the other two upon any of the two Doors of the Overseers of the Parish Unless they produce a Lycence from the Governour, in both which cases, and not otherwise, it shall be Lawfull for any minister or for any Justice of Peace to joyne the parties in marriage, Provided that the said Partyes do purge themselves by Oath before the minister or Justice that they are not under the Bonds of matrimony to any other Person Living, and if it shall be after proved, that either or both of the Parties are perjured, and thereby attained a double marriage for the said perjury, the party or parties offending shall bee boared through the tongue with a red hot Iron and moreover proceed against as in case of adultery is provided."

The history of the law of marriage and divorce in some of the countries of Europe is also given in outline; and the learned author has on more than one occasion to point out that the law is being modified from year to year. It is, perhaps, unfortunate that Dr. Stocquart has not taken into consideration the laws of the various Provinces of Canada. The clear line of distinction between the law of the Province of Quebec, based as it is ultimately upon the civil law, and the law of the other Provinces of Canada, which comes from the common law, makes the study of Private International Law one not only of interest but also of importance in the administration of justice in Canada; and it is to be hoped that the learned Doctor will upon a new edition of his work being called for, add a chapter referring to the laws here. While in the Canadian Courts there have been very few cases upon the validity of marriages celebrated and divorces obtained in foreign countries, it is certain that there must be cases of this kind from time to time in our Courts, and the rules laid down in this work must necessarily be of great assistance in arriving at the law which governs in such cases.

The discussion as to the change in the "Jurisprudence" of France as to divorce, mentioned on p. 63, constitutes one of the most interesting instances of the gradual evolution of the true principles upon which private international law is founded. It has been the habit too much amongst text writers to suppose that international law is really based upon Grotius and not upon the fundamental principles of right and wrong. While, of course, it is true that the past is full of instances where "might has made right," it is none the less true that there has been a gradual struggling upwards of principle in international law, as in all other law. The instances given by the learned author of the change in judicial decision shews this, and perhaps this is not the least valuable part of his work.

We recommend this book to the student who is desirous of obtaining a general view of the international condition of domicil, marriage, and divorce.

Since writing the above, the report has come to hand of the case of *Hay* v. *Northcote*, [1900] W. N. 134, the facts of which briefly are that in 1880 a Frenchman domiciled in France married at Bordeaux an Englishwoman domiciled in England in the manner prescribed by the Consular Marriage Act, 1849. In 1882, on the petition of the wife with the concurrence of the husband, the Courts of France decreed the nullity of this marriage as not having been performed in the manner prescribed by the French law. In this action, brought in England, the point for decision was whether this marriage was valid in England. The Court (Farwell, J.) held that however it might be in France (as to which he expressed no opinion) the marriage was valid in England.

(This may be compared with the case referred to by Dr. Stocquart on pp. 62, 63 of his work: *Garlet* v. *Garlet*, Dalloz Peri. (1891) 2, 198. It raises, moreover, the curious question whether a man may by the law of England have two lawful wives at the same time. Suppose the Frenchman had married again: beyond question such a marriage would be valid by the law of France. It is equally beyond question that should he come to England leaving wife No. 2 behind, wife No. 1 would be his lawful wife there. Sup-

pose, however, he brought the French wife with him to England!

By the comity of nations, a marriage celebrated in (at least) any civilized Christian country, valid where celebrated, is valid everywhere. Why should not wife No. 2, who is the lawful wife in France—whose marriage is valid in France—be the lawful wife also in England? And if so, that could not and would not *ex post facto* invalidate the marriage with wife No. 1. Would the happy Frenchman then have the two? He certainly is not guilty of bigamy; he certainly has done no wrong or illegal act. There is no law against a man having two wives—the offence is the marrying the second time in the lifetime of the former wife.

Perhaps Dr. Stocquart could enlighten us—or some of our learned readers.

Toronto. W. R. R.

American Law. a Treatise on the Jurisprudence, Constitution, and Laws of the United States, by James De Witt Andrews. Chicago: Callaghan and Company: 1900.

This is an ambitious work. It is a treatise upon the whole body of the American civil law—constitution and jurisprudence—and is contained (without index) in 1150 pages. The work-a-day lawyer's most natural criticism of such a work is, that, however accurate it may be, it is necessarily too sketchy to be of much service. But everything depends upon what you want. For many purposes a book-page map of Europe is more useful than a wall-diagram of Toronto; and Williams on Personal Property and Indermaur's Common Law (with their few pages upon a multiplicity of subjects) pass rapidly into further editions, although we have Byles on Bills and Addison on Contracts.

Possibly the first part of the book—dealing with theories of analysis, forms of government, and so on—may prove of interest to the profounder student only. To such the modification of familiar definitions suggested, or as Mr. Andrews thinks demanded, by republican institutions, is noteworthy. For example, municipal law in American jurisprudence is defined as "a rule agreed upon by the people

regulating the rights and duties of persons" (96). At the same time the tendency to separate American law from the general current may be exaggerated, and it is perhaps too much to say that "the American law of real property differs fundamentally from the ancient or modern law of tenure and estates as presented by Blackstone. This results mainly from the abolition of tenure and its feudal incidents, and from the changes in the status of husband and wife." (955-6). The feudal incidents of tenure may not exist in the United States, but apart from the theory (for it is very little more than a theory) that in Ontario all lands are held of the Crown, tenure exists as well south of the boundary line as north of it.

Mr. Andrews's point, however, is not concerned with the particular meaning to be assigned to the word "tenure" (which he might interpret so as to justify the quoted sentences) but rather to emphasize the preponderating element of *contract* in the law of real property. In this he has our concurrence. Ultimately title to land and title to goods will be seen to be the same thing. Torrens systems and other modern notions are rapidly carrying us to that conclusion.

For Canadians Mr. Andrews's book has a special value. Very frequently the busy lawyer desires to inform himself more in a general than in a closely particular fashion as to the view taken by the American Courts of the subject which he has in hand. This single volume will supply the answer to all such questions. And in very many instances even the minuter points will be found noted.

After a somewhat careful perusal of the book we may say that the searcher for American law should in the first place, at all events, consult this treatise; and only in case of failure take off his coat and prop himself as comfortably as he can for an attack upon huge digests and ponderous encyclopædias.

The chapters treating of the ever-present subjects of contract, agency, sales, master and servant, carriers, negotiable instruments, and so on, will be found to be extremely well-condensed and accurate statements of the law, to which reference may constantly and with advantage be made.

Winnipeg. J. S. E.

THE

CANADIAN LAW TIMES.

SEPTEMBER, 1900.

ONTARIO LEGISLATION, 1900.

I HAVE been asked to review the Ontraio legislation for the current year, and I have reluctantly undertaken the task.

There are numerous amendments of the Ontario Election Act. Thus provision is made to prevent the wind from surreptitiously blowing ballots through the key holes of ballot boxes, and to prevent the spontaneous combustion of "documents," such as ballot papers, and to regulate the trial and punishment, and the liabilities and indemnities, of boodlers.

"The Supplementary Revenue Act, 1900," the "Act to Amend the Ontario Companies Act," the "Act respecting the licensing of Extra-Provincial Corporations," and the "Act to Amend the Loan Corporations Act," may be conveniently dealt with together as an object lesson showing the constantly increasing tension of the governmental fingers grasping the throats of all corporations doing business in this Province, for the purpose of making the corporations cough up money in a constantly increasing volume to satisfy the increasing need or increasing greed of those who manipulate the fingers.

There is such a thing as killing the goose that lays the golden egg, and the Government appears to have discovered that the tension of the fingers had reached strangulation point with reference to one class of goose, and accordingly the tension has been sufficiently relaxed to enable the bird to

cough. The "Supplementary Revenue Act, 1899," provided that where a loan company has its head office in Great Britain or Ireland and employs a part of its paid up capital in Canada, the taxation of the company may be calculated upon the amount of the funds of the company which are used or employed in Canada. This was enacted against the protests of the companies affected, and the result was that such a company doing business in every Province of the Dominion would be bound to pay taxes in Ontario calculated upon the whole investments of the company in the Dominion.

The Act of the present year makes a faint-hearted attempt to remove such a gross injustice by enacting that "the Lieutenant-Governor in Council *may direct* that the tax shall be calculated upon the amount of the funds used or employed by the company in Ontario."

Loan companies having their head office in Great Britain or Ireland *may* be taxed in accordance with "the amount of the funds used or employed by the company in Ontario," while loan companies having their head office elsewhere (in France for example) and doing business in Ontario are taxed upon their whole paid up capital, though only ten per cent. of such capital may be invested in Ontario. Banks, trust companies, gas companies, telephone companies, etc., are taxed upon their paid up capital; insurance companies upon their premiums; railway companies upon their mileage in the Province. The anomalies of the Supplementary Revenue Act, 1899, as amended by the Act of the present year, are too numerous for consideration here; but to grasp the injustice of taxing upon paid-up capital just think of what the result would be if the Suez Canal Company were to open an office in Toronto, and that method of taxation were applied to that company.

Nearly two pages of the "Act to amend the Ontario Companies Act" are taken up with provisions as to the use of the word "limited" in connection with the names of companies. Legislative activity touching this matter has been so great that it is scarcely within the power of man to remember the state of the law thereon in the years 1897, 1898, 1899, and 1900. Such a volume of grandmotherly

legislation might lead the ignorant to believe that some statutory provision upon the subject is necessary for the protection of the public, instetad of its being, as it is, an archaic survival from the times when the general public did not understand the nature of a joint stock company.

This Act also contains the annual increase of imposts upon corporations in the shape of a schedule of fees chargeable for the "services" of the department in filing statements and other documents which the corporations are by statute forced to file.

The "Act to amend the Loan Corporations Act" contains a clause making it a penal offence for any "person, partnership, organization, society, association, company, or corporation, not being a corporation registered under this Act or under the Ontario Insurance Act," to use a name which includes any of the words "loan," "mortgage," "trust," "trusts," "investment," or "guarantee" in "combination or connection with any of the words 'corporation,' 'company,' 'association,' or 'society,' or in combination or connection with any similar collective term." It is to be noticed that one concern has paid heed to the Act by advertising as follows:—

"Money—The ———— Security Co.
Loans."

The governmental spider, ever weaving its web and watching for its corporate prey, has again by this Act arrogated to the executive a power which could with safety have only been vested in the Courts. This Act provides that "the charter or corporate franchise of a loan corporation incorporated under the law of the Province may at any time, for cause shown to the satisfaction of the Lieutenant-Governor in Council, be either suspended or revoked and made void by an order of the Lieutenant-Governor in Council."

When we remember that under the B. N. A. Act a Lieutenant-Governor may not be removed except "for cause assigned," and when we remember that a Lieutenant-Governor was removed and that the cause assigned was that "his usefulness was gone," we are apt to conclude that the provision in this Act that the revocation of the charter is to be

"for cause shown" is not a sufficient protection to the corporations affected.

The feverish activity of the Corporations Department is manifested by the "Act respecting the Licensing of Extra-Provincial Corporations," which is apparently aimed chiefly against corporations holding Dominion charters, and which provides that such corporations shall not do business in this Province unless they first take out a license under the Act. This is another grip in the anaconda coil which is persistently and methodically enfolding the corporations.

The Act provides that such corporations may carry on business in the Province subject to "such limitations and conditions as may be specified in the license."

Nice questions may arise as to the power of the Provincial Legislature to authorize the imposition of "limitations and conditions," in the case of certain Dominion corporations.

It is true that the Judicial Committee of the Privy Council have held that, notwithstanding s. 91, s.-s. 15, of the B. N. A. Act, a Provincial Legislature may tax a bank although its head office is outside of the Province, and although the amount of the tax is regulated by the amount of the paid up capital of the bank and by the number of its branch offices, including as well those inside as those outside of the Province. The same Committee also held that the power in question existed although it was capable of being so used as to "crush a bank out of existence, and so to nullify the power of Parliament to erect banks" (*a*).

One cannot help feeling that the decision in question is in some measure accounted for by the constitution of the Committee upon the occasion in question, and that the Committee did not fully appreciate the fact that the craving for taxation and powers of taxation is a disease which grows by what it feeds upon.

A Provincial Legislature has the power of "direct taxation within the Province in order to the raising of a revenue for Provincial purposes," and it has been held by the Judicial Committee that the imposition of a tax by way of license,

(*a*) Bank of Toronto v. Lambe. 4 Cart. at p. 21.

as a condition of exercising rights within the Province, is a mode of taxation falling within the powers of a Provincial Legislature (*b*).

Under s. 91, s.-s. 29, and s. 92, s.-s. 10, it is provided that "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects" enumerated, which classes include, among other corporations, lines of inter-provincial ships, railways, telegraphs, etc., etc.

With regard to such undertakings it has been determined that their construction, maintenance, and operation fall within the exclusive legislative power of the Parliament of Canada (*c*).

The difficulty which arises is this:—to what extent, if at all, can a Provincial Legislature, under the guise of licenses, granted upon conditions imposed by the Legislature, regulate or control the construction, maintenance, or operation of such undertakings?

It is submitted that an answer to this question may be reached by applying a test suggested in Hodge v. The Queen, namely:—"Subjects which in one aspect and for one purpose fall within s. 92 of the B. N. A. Act, may in another aspect and for another purpose fall within s. 91" (*d*).

If, therefore, the substantial and primary purpose of the imposition of a license upon the corporations in question be to levy "direct taxation within the Province in order to the raising of a revenue for Provincial purposes" (s. 92, s.-s. 2), or is the imposition of "shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for Provincial, local, or municipal purposes," (s. 92, s.-s. 9), such imposition will be intra vires; but if such purpose be to regulate or control the construction, maintenance, or operation of the undertakings of such corporations, the imposition will be ultra vires.

(*b*) Attorney-General for Canada v. Attorney-General for Ontario, [1898] A. C. 700.

(*c*) See Canadian Pacific R. W. Co. v. Corporation of Notre Dame de Bonsecour, [1899] A. C. 367, and Madden v. Nelson, etc., R. W. Co., [1899] A. C. 626.

(*d*) Hodge v. The Queen, 3 Cart. at p. 160; and see 12 C. L. T. 125,

The answer to the question will, therefore, in each particular instance depend upon the determination of a question of fact by the Court.

The Mines Act is amended to the extent of 25 sections and 59 sub-sections.

We next come to the Annual Omnibus Act known as "An Act to amend the Statute Law," which covers all sorts of things from changing the name of a Cheese and Butter Association to amending the Ontario Insurance Act.

Section 57 of the County Courts Act is amended so as to give jurisdiction in certain cases to a Judge of the High Court to extend the time for setting down an appeal from a County Court to a Divisional Court. This amendment was doubtless brought about by such cases as McCarron v. Metropolitan Life Ins. Co. (*e*) and Smith v. Hay (*f*).

Power is given to the Judge appealed from or to a Judge of the Court of Appeal to grant special leave to appeal, when it is desired to appeal from an order made by a Judge acting under statutory authority as persona designata. A case like Re Simpson and Clafferty (*g*) shows the necessity for such a change in the law.

It is difficult to understand why it was deemed necessary to repeal 14 Geo. III. c. 78, relating to fire insurance (*h*). That statute was repealed by 50 V. c. 26, s. 154, which was consolidated into R. S. O. 1887 c. 167, s. 155. It is true that the latter statute was repealed by 60 V. c. 36, s. 198 (1), but this repeal did not have the effect of reviving the English statute, as will be seen by reference to the Interpretation Act, s. 8 (46).

It is still more difficult to understand the utility of the amendment of the Devolution of Estates Act by striking out the words "and there are no debts" in the 10th line of s.-s. 1 of s. 16. The object is to bring personal representatives still more completely under the official thumb. We shall soon reach the stage when there will be an official Old Man of the

(*e*) 19 Occ. N. 230.
(*f*) 19 Occ. N. 231.
(*g*) 18 P. R. 402.
(*h*) See Carr v. Fire Insurance Co., 14 O. R. 487, relating thereto.

Sea riding the neck of every citizen who is not an official. Under the law as it stood the personal representatives of a decedent might, as of right, sell his real estate for the purpose of paying his debts. The effect of the amendment is that where infants or lunatics are beneficially entitled, or where other heirs or devisees do not concur in the sale, no such sale shall be valid as respects such infants, lunatics, or non-concurring heirs or devisees, unless the same is made with the approval of the official guardian.

Provision is made that trustees may pass their accounts before the Judge of the Surrogate Court, and that their so doing shall have the like effect as the passing of executors' or administrators' accounts. The case of passing executors' accounts is regulated by s. 72 of the Surrogate Courts Act. The effect of passing the accounts of executors or trustees before the Surrogate Court now is that they, "except so far as mistake or fraud is shown, shall be binding upon any person who was notified of the proceedings taken before the Surrogate Judge, or who was present or represented thereat, and upon every one claiming under any such person."

Apart from statutory provision a Court of Probate has no jurisdiction over the accounts of trustees as such, whatever may be its jurisdiction over the accounts of executors, and therefore where a probate Court had passed the accounts of executors and trustees, with reference to their dealings in their capacity as trustees, it was held that a Court of equity could re-open the account and disallow charges which had been allowed by the Probate Court (*i*).

The power of the Judge of a Surrogate Court to make an allowance to trustees for their care, pains, and trouble and their time expended in or about their trusteeship was formerly limited to the case of trustees acting under a will, but it is now extended to all kinds of trustees "howsoever the trust is created," which would include constructive trustees.

Express provision is made that where a chattel mortgage is made to an incorporated company the affidavit of bona fides may be made by the president, vice-president, manager, assistant manager, or other officer of the company duly authorized for such purpose.

(*i*) Grant v. Maclaren, 23 S. C. R. 310.

A question will arise whether an express authority will be required in the case of the enumerated officers, or whether in their case authority will be presumed, and express authority required in the case only of unenumerated officers.

Section 21 of the Omnibus Act provides, with certain exceptions, that "every conveyance before the 1st July, 1884, executed by a married woman of or affecting her real estate, shall, notwithstanding her husband did not join therein, be taken and adjudged to be, and to have been, valid and effectual to have passed the estate which such conveyance professed to pass, of such married woman in the said real estate."

Conveyances by a married woman of her real estate, executed since the date mentioned, do not require any such quieting title enactment, for they are effectual to pass the wife's interest in the property notwithstanding that the husband did not join therein (*j*).

The necessity for such a quieting title enactment as that above referred to will be seen by reference to Snow's Legal Compendium, 1900, pp. 290-1.

The Trustee Investment Act is amended and trustees' powers of investment are extended and they are permitted to invest, among other things, in "the debentures of any municipality in this Province." It is also provided prospectively and retrospectively that no executor, administrator, or trustee shall be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law.

Notwithstanding my undertaking to review the Ontario legislation of last session, I positively refuse to wade through the 62 sections of the Municipal Amendment Act, 1900.

It is a burning shame that the profession and the public should year by year and every year be inflicted with the legislative excrescence known as the Municipal Amendment Act. In 1866 there was a complete and consolidated Municipal Act, containing nearly all the essential features of the

(*j*) See Snow's Legal Compendium, 1900, pp. 289-90.

present municipal system. In 1867 came the British North America Act, which conferred upon the Legislature of the Province exclusive jurisdiction over municipal institutions in the Province. In 1868, 1869, 1870, 1871, and 1872, there were amending Acts passed by the Provincial Legislature, and in 1873 the whole municipal system was codified in the Municipal Institutions Act of that year, containing 515 sections. In the following year that Act was amended; and I think that I am correct in saying that there has been a Municipal Amendment Act every year from that year to the present date. When in 1897 the Municipal Act was consolidated in the Revised Statutes of that year, in a chapter containing 750 sections, there was reason to hope that the Legislature after thirty years of unremitting tinkering with the Municipal Act would give it a rest. But no; in 1898 the amending Act contained 43 sections; in 1899 it contained 53 sections; and this year it contained 62 sections. It is in accord with the general system to amend some particular section, and then to amend the amendment, and then to repeal the amendment to the amendment, and so on ad infinitum. It is beyond the power of mortal man to grasp and follow our Municipal Act as a matter of memory. There can be no reasonable excuse for this legislative enormity. As no relief can be obtained by an appeal to the legislative brain, all that remains to a long suffering public is to pray for a paralysis of the legislative hand.

Johnston v. Consumers' Gas Co. (*k*), and the questions mooted in connection therewith as to the status of the city of Toronto to maintain an action for the purpose of asserting and enforcing the rights of the citizens of Toronto against that company, have doubtless led to the enactment of c. 85, which provides that where obligations are or have been imposed by statute upon any person or corporation in favour of a municipal corporation or the inhabitants or some of the inhabitants thereof, or where such obligations are or have been created by contracts which have been validated by statute, such municipal corporation shall be entitled not only to enforce the obligations in favour of itself, but also to enforce those in favour of such inhabitants as fully as the

(*k*) [1898] A. C. 447.

same could be enforced by the Attorney-General in an action brought by him on the relation of any person or corporation interested.

This is a bit of special legislation introduced for the purpose of enabling the Attorney-General to run with the hare and hunt with the hounds, when he was being pressed by the city of Toronto to grant his fiat for the bringing of an action in his name, on the relation of the city of Toronto and of a ratepayer and gas consumer, for the purpose of enforcing the statutory obligations of the said company, and was being equally pressed by the said company not to grant the fiat, because, as they innocently suggested, no such thing was necessary.

In England no such statute as the present one would be necessary, because there can be no doubt that in any such case as the one in question, or in any other proper case, the Attorney-General would without hesitation grant the requisite fiat. But England is one place and Ontario is another. Perhaps it is our geographical situation and the political deterioration resulting therefrom which have had a weakening effect upon the executive spine.

Taking things, however, in this Province as we find them the chief fault with the statute is that it does not go far enough; it is too restricted in its operation. In view of the existing condition of affairs it would be better (subject to proper restrictions such as giving security for costs, etc.) to allow any corporation or person interested to maintain actions in the nature of class actions, and therein to enforce obligations in favour of the public and restrain public wrongs as fully as if the Attorney-General were a plaintiff in the action.

According to the present practice in the Attorney-General's office, if a person desires to commence an action upon his own relation in the name of the Attorney-General, he has to apply to the Attorney-General for his fiat for the issue of the writ; the applicant is then directed to serve notice of his application upon his opponent; and then both parties represented by counsel appear before the Attorney-General. Counsel for the proposed defendant then usually

suggests that no fiat is necessary because the applicant if injured has his individual right of action, and it is not necessary for the Attorney-General to be a party (if the applicant falls into this trap he will discover by the time the action comes on for trial that there has been a change of view upon the part of the defendant's representative); if this scheme fails to work, the defendant's representative then applies for particulars in writing of the proposed action and the grounds thereof and the facts alleged in support of the same, and this is usually granted to him; after delivery of the particulars the parties by their counsel again come before the Attorney-General, and counsel for the applicant is called upon to argue as a matter of law (and to support his argument by authorities) that the proposed action is one which is maintainable in law and is one which the applicant could not maintain in his individual capacity without the intervention. Judgment is then usually reserved and subsequently delivered with all due solemnity; so that you have a preliminary sham trial the effect of which is to force the applicant's counsel to coach his opponent on both the law and the facts which will be involved in the subsequent real trial.

Next we come to "An Act to permit Municipalities to use Voting Machines." This may be useful for rural municipalities, but it can scarcely be needed in Toronto where the churches, the lodges, and the fire halls combine to form a little machine which is quite adequate to manipulate the Toronto vote.

Chapter 49 is a consolidation of the Ontario Game Laws.

Differing in this respect from their jurisdiction relating to the fisheries, the Provincial Legislatures may enact laws regulating the killing and possession of game at certain times of the year (*l*).

Doubtless they may also regulate, control, and restrict the time and manner in which the killing may take place and the instruments by which it may be done.

(*l*) Regina v. Robertson, 3 Man. L. R. 613; Regina v. Buscowitz, 4 Brit. Col. L. R. 132; Regina v. Cleghorn, 13 Occ. N. 11.

It is to be noticed that under this statute skunks are outlawed and it is allowable for any one to kill them on sight (without any close season). Some of the politicians had better seek cover.

Protection is given to private preserves of game. The non-statutory law upon this point is set forth in Long Point Co. v. Anderson (*m*) and Beatty v. Davis (*n*).

Chapter 50 is "An Act respecting the Fisheries of Ontario," and is a consolidation of the Provincial laws relating to fisheries. It is another instance of a cowardly sort of legislation which appears to have found favour among our Provincial legislators. It provides that the Act shall apply to all fishing and all matters relating thereto "in respect of which the Legislature of Ontario has authority to legislate for the purposes of this Act." It is to be noticed that this sort of phraseology is usually adopted when the Legislature is deliberately attempting to overstep the bounds of its authority.

The respective powers of the Dominion Parliament and of the Provincial Legislature relative to fisheries are defined by the Judicial Committee of the Privy Council in Attorney-General for Canada v. Attorney-General for Ontario (*o*), and they may be summed up as follows:—

The Dominion has no proprietary rights in the fisheries within the Dominion, whether upon the sea coast or inland; therefore the Dominion Parliament cannot grant an exclusive right of fishing, although it may impose a tax by way of license as a condition of the right to fish, and it may legislate in relation to fisheries; thus, for example, it may prescribe the times of the year during which fishing is to be allowed, and the instruments which may be employed in fishing. On the other hand, the Provincial Legislatures have no power to regulate, control, or restrict the public rights as to the time or manner of fishing, but they may impose a license as a condition of the right to fish, and they may legislate as to the terms and conditions upon which the fisheries, which are the property of the Province, may be granted, leased, or

(*m*) 19 O. R. 487.
(*n*) 20 O. R. 373.
(*o*) [1898] A. C. 700.

otherwise disposed of, and the rights which, consistently with any general regulations respecting fisheries enacted by the Dominion Parliament, may be conferred therein, as such legislation would deal directly with property, its disposal, and the rights to be enjoyed in respect of it, and would fall within their jurisdiction touching "property and civil rights," and that touching "the management and sale of public lands."

Section 13 of the Act provides that no person shall take any fish from any Provincial waters by any means other than by angling without first obtaining a lease or license. Light is thrown upon this section by reference to s. 30 of c. 288, R. S. O., from which this section is adapted. If this section is intra vires, then the Provincial Legislature under the guise of conditional licenses may have the most absolute control over the time when and manner in which fish may be caught, notwithstanding that the Judicial Committee say that such power of control is vested exclusively in the Dominion Parliament.

Section 14 provides that no person shall "possess any fish" caught in Provincial waters at a time or in a manner prohibited by law.

Provincial waters are defined to mean waters "over or in respect of which the Legislature of this Province has authority to legislate for the purposes of this Act." This may be considered smart legislation, but it can scarcely be considered satisfactory legislation.

Section 32 provides that the finding of any nets, etc., set in violation of the Act shall be prima facie evidence of the guilt of the person owning the same.

Section 44 provides that certain kinds of fish shall not be exported from the Province before the 1st day of July, 1903.

Section 45 provides that no sturgeon shall be caught without a license and none shall be taken between the 1st of April and the 10th of May.

Section 46 provides that no person shall catch by angling in one day more than twelve bass, twenty pickerel, or four maskinonge.

Sections 47, 48, 49, and 50 contain restrictions as to the number and size and weight of trout, bass, and other fish which may be caught. If these restrictions are not in contravention of the judgment of the Judicial Committee, it is difficult to imagine what would be in contravention thereof. Of course, there is always the saving clause to fall back upon that the Act is only to apply in so far as the Legislature has "authority to legislate for the purposes of this Act."

The Dominion Parliament has undoubted authority to impose the legislative restrictions referred to, and it appears to be scarcely dignified for the Provincial Legislature to deliberately attempt to exceed its jurisdiction under the thin excuse that the Act is to apply only in so far as the Legislature has "authority to legislate for the purposes of this Act."

Chapter 102 is special legislation relating to the city of Toronto and the Toronto Railway Company, and ss. 1 and 5 thereof are of public interest and are made necessary by cases like City of Kingston v. Kingston, etc., R. W. Co. (*p*), which hold that the Courts will not order specific performance of agreements regulating the operation of a railway company where the agreements cover the performance of a long series of continual acts of personal service extending over an indefinite period. The sections in question provide that the parties to the contract between the city of Toronto and the Toronto Railway Company may maintain actions to compel the performance of or to restrain the violation of any of the covenants therein contained, and that the Court shall, notwithstanding any rule of law or practice to the contrary, inquire into such breach and determine the nature and extent thereof and make an order specifying what things shall be done or forborne as a substantial compliance with the said agreement. The only apparent objection to this Act is that it is special legislation dealing with a specific case. The principle involved in the Act should be made a part of the general law of the land.

Toronto. A. H. MARSH.

(*p*) 28 O. R. 399.

EDITORIAL REVIEW.

Death of the Lord Chief Justice of England.

The Lord Chief Justice of England, Charles Russell, Baron Russell of Killowen, died suddenly at 8 o'clock on the morning of Friday the 10th August, at his London house, from exhaustion consequent on an operation he had undergone on the previous day for a gastric ailment. He was in his 68th year, a native of Newry, Ireland, and a Roman Catholic. He joined the English bar in 1859, rapidly attained a foremost place in it, and for many years before his elevation to the Bench was recognized as the greatest advocate of the day. He was Attorney-General in the Liberal Government of 1885-86, and again in that of 1892. In 1894 he succeeded the late Lord Bowen as a Lord of Appeal in Ordinary, and a few months later he was appointed Lord Chief Justice of England on the death of Lord Coleridge.

Though a great and highly successful advocate, or perhaps because he was such, he was not a great Judge in the usual sense of that phrase. He has left no distinct mark on the law of England; he was not a scientific jurist. He was restless, fervid, forceful, earnest, intense—a "relentless cross-examiner" somebody called him—and a tremendous worker. His strength had to be diluted for the Bench; his masterfulness curbed; and it was perhaps somewhat to the surprise of those who knew him best that he ceased to be an advocate when he went upon the Bench, and earned a reputation as a Judge, not indeed equal to his fame as an advocate, but a reputation equal to that of some of the foremost of his predecessors in the office of Lord Chief Justice.

"His power of getting at truth was most rare," says the Thunderer. "None of his contemporaries, few, if any, perhaps, of his predecessors, equalled him in the thoroughness with which he investigated the most complicated facts, the amplitude of his grasp, and the vigour of his unfailing good sense. . . . To see him at his best was to see

him presiding over a trial where great interests were at stake and passions ran high. Then and there he was a true Chief Justice; the majesty of the law speaking through him in apt and dignified words. Take, for instance, his conduct of the trial at Bar in June of 1896 of The Queen v. Jameson and others, and his prompt and acute decision on novel points of law and evidence which arose in the course of the case. An investigation which might, if another Judge had presided, have dragged on for days and have abounded in scenes was, thanks to his strong guiding hand, brought to a rapid termination. It is true that he showed his desire for a conviction too clearly, and that lawyers are not at one as to some of his rulings . . . But in most essentials the trial was what a national inquest should be. The spectators of that trial could not but contrast its conduct with the course of several trials in which his eloquent predecessor, Sir Alexander Cockburn, presided. The contrast was not to the disadvantage of Lord Russell; in dignity, in abstention from all vain personal intrusion, in prompt and firm grasp of facts, he was at least the equal—many would say the superior—of his brilliant predecessor."

Copyright in Report of Speech.

In the House of Lords, on the 6th August, judgment was given in the appeal (Walter v. Lane) of the proprietors of *The Times* against the decision of the Court of Appeal reversing the judgment of Mr. Justice North, who had granted an injunction restraining the defendant, a publisher, from infringing in a book he had issued their copyright in their reports of certain speeches of Lord Rosebery's. The Lord Chancellor, in moving that the judgment of the Court of Appeal be reversed and that of Mr. Justice North restored, said he should very much regret if he were compelled to come to the conclusion that the state of the law permitted one man to make profit of, and to appropriate to himself, the labour, skill, and capital of another. It was not denied that in this case the defendant sought to appropriate to himself what had been produced by the skill, labour, and capital of others, and in his view the law was strong enough to restrain what, to his mind, would be a grievous injustice.

The sole ground of the judgment of the Court of Appeal was that the producer of a speech, unless he were the original speaker, could not be an author within the meaning of the Copyright Act. This argument, he held, was based on too narrow and misleading interpretation of the word "author." Copyright was given by the statute to the first producer of a book, whether it were wise or foolish, accurate or inaccurate, of literary merit or of no merit whatever. Lord Davey, in concurring with the Lord Chancellor, said that if *The Times* were claiming a property in the speeches themselves and seeking to prevent anybody else from publishing any other report of them, there would be cogency in the argument that the reporter was the reproducer and not the producer of the speeches. But the appellants only sought to prevent the respondent from multiplying copies of their own report of the speeches and availing himself for his own profit of the skill, labour, and expense by means of which that report was produced and published, and to that claim he could not see that there was any answer. Lords James of Hereford and Brampton also gave judgments concurring with the Lord Chancellor. Lord Robertson differed, holding that, however skilful or well-qualified a reporter might be, he could not be considered an author with the meaning of the Act. In the result their Lordships reversed the judgment of the Court of Appeal, and granted a perpetual injunction against the publication by the respondent of the reports of which the copyright is claimed by *The Times*. (From *The Times*.)

Thackeray and the Temple.

Mr. Herman Merivale, the dramatist, upon whom a civil list pension was conferred the other day, was for some time a practising member of the Bar. As in the case of so many others, so with him the charms of literature and dramatic art proved stronger than those of the law. Accordingly he abandoned the Western Circuit, which he had gone for some years, and devoted himself to letters. Several books have come from his pen; among these is a short life of Thackeray (written in conjunction with Mr. Marzials), in

which he mentions an incident interesting alike to the lover of the Temple and its literary associations and to the students of the great novelist. When living on the third floor of No. 3, Garden-Court—the old Garden-Court, of course, not the present substantial but uninteresting structure—Mr. Merivale states that he had the pleasure of entertaining Thackeray in the identical chambers which served him as the model for those described in *Pendennis* as inhabited by Chevalier Strong and Altamont in Shepherd's-inn, with the water-pipe and gutter which provided the means of escape to the Chevalier and his friends from the too pressing visits of duns and sheriff's officers—all as detailed in that admirable novel which to the Templar has long been a classic. As Mr. Merivale says, Thackeray had his originals in brick and mortar, as in flesh and blood. (From the English Law Times, 14th July, 1900.)

Extra-Judicial Undertakings.

In England the legal periodicals are speaking out very plainly against the acceptance by Lord Justice Romer of a place on the South African Hospitals Committee. Indeed a question was asked about it in the House of Commons by a member of the Bar. The answer was that the necessary arrangements for filling the Lord Justice's place in the Court of Appeal would be made by the Lord Chancellor; but we learn by subsequent reports that the arrangements actually made were in fact far from satisfactory. Not only does the public suffer by the absence of a judge from his ordinary place, but the future usefulness of the judge may be greatly impaired by the criticism which his actions as a member of an extra-judicial commission may meet with. In Canada commissions to judges to investigate all sorts of matters are becoming alarmingly common, and we scarcely like the tone which the lay press takes in commending or reprobating the reports which are made by judicial commissioners. Lord Esher in 1892 spoke thus in regard to the attacks on Mr. Justice Mathew as president of the Irish Evicted Tenants' Commission:

"The Master of the Rolls, referring to the independence and impartiality which characterised the judges' action, said

their education and training made them impartial and determined to do what was right in every question which came before them. This, indeed, was so well known and recognised that when the judges of England acted within the scope of their ordinary duties nobody ever attempted even to suggest that they were not impartial. At the present time, however, they knew that one of the judges had been asked to go beyond the scope of his ordinary duty, and he for one was surprised and sorry that the judge in question had consented to do so. The result was inevitable. The judge had been fiercely accused already of partiality or of a want of desire to do justice. He could safely say that throughout his experience of twenty-four years there had not been a judge on the English Bench who had shown at any time or in any position any other feeling or desire than that to be absolutely impartial and to do right." (*The Times*, 10th November, 1892.)

Hot Weather Bar Anecdotes.

Mr. T. H. Beck, the First Assistant Attorney-General of the United States, at the recent banquet in London to the American Bench and Bar, told some stories. The reporters complained that they could not hear him, but one or two of the anecdotes were preserved. One of these was that he once had to prosecute a negro for violation of the revenue laws. A very strong case was made against the defendant, whose counsel turned towards him and asked, "Do you want to take the witness-stand and testify on your own behalf?" "Well, lawyer," answered the negro, "I think I had better remain neutral." Another was of a young American lawyer, who, in arguing a case in the Court of Appeal, commenced by citing a dozen authorities in support of some very elementary proposition. The presiding judge interrupted him by saying, "You need not cite any more authorities; you may safely assume that the Court knows something." "If your honour will permit me to proceed" replied the undaunted young advocate, "I should like to do so in my own way. I may say that the assumption that the Court knew something was the mistake I made in the court below."

Judges as Members of the Bar.

At a dinner recently given to the new Solicitor-General for England by his brethren of the Inner Temple, Lord Halsbury, who is a Bencher of that Inn, was present without any special invitation, and stated that he was there, not as Lord Chancellor, but as a member of the Bar. This statement, it appears, has given rise to some discussion in England, but it is in fact well settled that a man by becoming a judge does not cease to be a barrister. In Ontario there are two gentlemen who were Vice-Chancellors but left the Bench and went back to practice, without, as far as we can remember, any suggestion that they were not strictly entitled to do so, though the expediency or propriety of it was challenged. It is said that the late Lord Justice Barry, when going the Munster circuit as Judge or Commissioner of Assize, used, when the Munster Bar entertained the judges at Cork, to retire with his brother judge at a comparatively early hour, and to come back as "Charlie Barry," to finish up the evening with his brethren of the Bar, he having formerly been the leader of the Munster circuit.

False Pretences.

The recent case of Regina v. Button, decided by the English Court for Crown cases reserved, overrules Regina v. Larner, 14 Cox C. C. 497, and is interesting as exemplifying the modern tendency to breadth of construction even in criminal matters. The facts were practically the same in both cases; the earlier one was a decision of Sir W. Charley, the Common Serjeant, after consultation with Stephen, J. The prisoner personated another man, who was a much worse runner, got a long start in a handicap foot race, and won it, but, being afraid of discovery, left the ground without applying for the prize. He was subsequently indicted and convicted (subject to the case reserved) for attempting to obtain the prize by false pretences. It was held in Regina v. Larner that the false pretence was too remote; but in the recent case the Court brushed away the subtlety and declared that, as the object of the prisoner was to get the prize, the pretence was not

exhausted by his admission to the race—it was impossible for him to win it without the false pretence which gave him the opportunity of exercising his skill.

Changing One's Name.

Despite the very common impression to the contrary, a man or woman may change his or her name at will, and it is not necessary for the changer to take any formal step to effectuate it—such as obtaining legislative or judicial sanction—or even to advertise the change, though it is usual, for evidential purposes and to give notoriety to the change, to do so.

There are two recent Scottish cases dealing with this subject, and illustrating respectively when a change of name must be sanctioned by the Court, and when it need not. The first was a petition by a clerk in holy orders whose baptismal name was Henry Johnson (2 Ct. of Sess. Cas., 5th series, 75), but who had adopted the name of Henry Lindsay Johnston, and under this adopted name had been entered in the books of the University of Cambridge when he took his degree. His complaint was that the Bishop of Rochester had refused in his letters of deacon's orders to enter him by any other name than by his baptismal one, and had intimated that he meant to do the same thing in the case of his priest's orders, and the petitioner asked the Court to sanction the change; whereupon the Court, premising that any person in Scotland might as a rule call himself what he pleased, and that it was accordingly its custom to dismiss petitions for the Court's authority in such cases as unnecessary, yet said that here there was reason in the petition, and authorised the change. The petitioner in the other case (ib. p. 127) was one James Alexander Robertson, and he wanted the sanction of the Court to his changing his name to James Alexander Robertson-Durham. The ground of the application was that he was a chartered accountant by profession, and was frequently appointed by the Court a judicial factor, curator bonis, liquidator, or trustee, and he seems to have imagined that filling these executive appointments disentitled him to change his name without the sanction of the Court; but Lord Adam—again

emphasising the right of every Scotchman to add to or alter his name as he liked—pointed out that a person like a judicial factor is in quite a different position from a notary, a writer to the Signet, or other persons whose names are entered on a roll or register. A notary is an Imperial officer, so is a writer to the Signet, and for such persons to change their name naturally requires the authority of the Court. (Law Journal, 28th July, 1900.)

An Osgoode Hall Story.

The following comes all the way from India, being printed in Vol. II., No. 11, of the Bombay Law Reporter:

"A gentleman named Casey, an Irishman, was offered an appointment under the Government at Ottawa. The position technically needed to be filled by a member of the legal profession, which Casey was not. The Government then intimated to the Benchers of the Law Society of Ontario that they would take it as a favour if they called Mr. Casey to the Bar. The Benchers thereupon met, and appointed one of their number, a learned Q. C., by the name of Wolcott, a special examiner to examine Mr. Casey as to his knowledge of law, and report to them, with the understanding that he was to make it easy for him, so that Mr. Casey would be called without having to go through the long course and stiff examinations usually requisite. Mr. Casey having come up from Ottawa, Mr. Wolcott, who was, by the way, a great friend of Casey's, drove to the Session House in a cab, so that he might take his friend to Osgoode Hall, where he was to be called. On the way Wolcott asked Casey; "Well Casey, what do you know about law, any way?" "To tell you the truth, Wolcott, I don't know a single thing." On arriving at Osgoode Hall, Mr. Wolcott made his report, and in his affidavit stated "that he had examined Mr. Casey as to his knowledge of law, and, to the best of his information and belief, he had answered the questions that he had put to him correctly." Mr. Casey was, thereupon, duly called to the Bar."

We have a respect for a story which has been twice round the Cape—for the original source is no doubt American—and we therefore hesitate to pronounce this apocry-

phal. But there are certain difficulties in the way of accepting it in its entirety, which will be obvious to most of our readers.

Recent American Decisions.

One who explodes a blast upon his own land, and thereby causes a piece of wood to fall upon a person lawfully travelling in a public highway, is held, in Sullivan v. Dunham (N. Y.), 47 L. R. A. 715, to be liable as a trespasser for the injury thus inflicted, although the blast is fired for a lawful purpose and without negligence or want of skill.

The franchise and right of way of an elevated railroad company whose road is built upon a structure about 20 feet high, supported by pillars resting on the street, are held, in Lake Street Elevated R. Co. v. Chicago (Ill.), 47 L. R. A. 624, to constitute property subject to assessment for benefits by paving the street.

A girl seventeen years of age, who enters a convent for the purpose of becoming a nun, without having obtained her parent's consent is held, in Prieto v. St Alphonsus Convent of Mercy (La.), 47 L. R. A. 656, to be subject to the claims of her parents, although she had been received in the convent on the supposition that she had obtained such consent. Under such circumstances it was held that she could be released by writ of habeas corpus, even if the girl was willing and anxious to remain in the convent, and was under no actual restraint.

A person starting to cross a railroad track, but prevented from doing so by a train, who, on finding that the safety gates have been closed, takes a dangerous position, disregards a call to get back, and resists the gateman's efforts to remove him to a safe place, is held, in McAnally v. Pennsylvania R. Co. (Pa.), 47 L. R. A. 788, not to have any right to recover from the railroad company for being thrown down in the tussle, in consequence of which his leg is cut off by the train, since the proximate cause of the accident was his resistance to the effort to save him.

BOOK NOTICES.

The Law Magazine and Review, a Quarterly Review of Jurisprudence, being the combined Law Magazine, founded in 1828, and the Law Review, founded in 1844. London: J. G. Hammond & Co., Limited. We have received as an exchange the August number of this quarterly review, containing leading articles on Solicitors and Reform, by A. H. Hastie; Notes on the early History of Legal Studies in England, by Joseph Walton, Q.C.; Privileged Communications, by J. K. F. Cleave; and on other subjects by eminent writers.

Ames on Forgery, Its Detection and Illustration, with numerous causes célèbres (illustrated), by Daniel T. Ames. San Francisco: Bancroft-Whitney Company.

No writer can know all the innumerable characteristics of his own handwriting.

No one can observe and note all the habitual characteristics in the writing of another.

Were one conscious of all his own personalities and able to perceive all those of another writer, the hand at the mere command of the will cannot be so controlled as to entirely avoid the one and reproduce perfectly all the others. Force of habit will constantly inject the personalty of the writer, while the unnoted personalty of the imitated writing will be constantly omitted.

These are the main propositions of the author of a very interesting book with the above title. He is an expert witness of very great experience, but he does not pretend to any occult knowledge; he observes and reasons; and, like the late Mr. Sherlock Holmes, his methods appear simple when duly explained. The stories of his many "cases" make very good summer reading.

CORRESPONDENCE.

Citation of Canadian Cases in England.

To the Editor of THE CANADIAN LAW TIMES:—

SIR,—A book review in the last number of the *Law Quarterly Review* calls again to our attention the estimation in which the decisions of Canadian Courts are held by a certain class of English lawyers. The work in question (Beal's Law of Bailments) contains citations of Canadian cases, and the reviewer says:—"It is a novelty to find Canadian cases attached. To English lawyers they may sometimes be useful, and they will no doubt add greatly to the value of the work in Canada." How good of him! I wonder if he ever read a Canadian case, or if the legal drill in England, like its next of kin prepared for Tommy Atkins, would, as customarily applied, prohibit anything in the nature of receptivity from any source outside of the four corners of England. The reviewer proceeds:—"As they are all added in foot-notes apart from the English cases and kept out of the text altogether, even the most insular of English lawyers has only to disregard them."

How delightfully English (of a certain type); so insolent and so self-satisfied; so offensive and so utterly innocent of any intention to offend. Apparently "the most insular of English lawyers" are willing to take chances of infection from having the Canadian cases cited in foot-notes so long as they are herded separately, but the insular gentlemen would not risk the danger of contagion from having them in the body of the text or from having them camped with the English cases in the same foot-notes.

Our reviewer again proceeds:—"The author seems to be much impressed with the danger of citing American decisions and has rigidly excluded them, quoting dicta of several judges as his justification."

True, there is a danger in citing American decisions; it is dangerous for certain people to handle edged tools; one

should not cite American decisions without having a sufficient knowledge of American jurisprudence to enable him to understand the extent to which those decisions are affected by statutory provisions, or by political exigency, or by environment, or by the various other local causes which more or less dominate American jurisprudence. For one who takes his legal drill in the Tommy Atkins style it is safer to leave American cases alone and let them be cited by those who understand them; but if they are intelligently cited it is safe to say that there are few branches of the law with reference to which one may not turn to the American cases with a fair hope of edification. The American cases are all right, but it requires a lawyer who is something more than a mere insular practitioner to cite them.

Our reviewer, referring to the rigid exclusion of American cases by the author, proceeds to say:—"But he quotes freely, with due acknowledgment, from Story" [it is easier to quote from Story than to intelligently cite American cases]; "and the decisions of leading American Courts are at any rate as valuable as Story's opinions, except so far as those opinions may now be embodied in authoritative English judgments. As to the judicial dicta against citing American cases, as many might be produced the other way; in fact they have been used by the House of Lords itself: see per Lord Herschell in Mills v. Armstrong (1888), 13 App. Cas. at p. 10. The truth is that judicious use is quite compatible with warnings against abuse."

The attitude of the English Bench towards Colonial decisions may be gathered from the following extract from the preface to the third edition of Bunyon's Fire Insurance: —"In the North British case already referred to, a protest appears to have been raised in the Court of Appeal to the citation of cases from the State Courts of the United States, and it is said that the following observations fell from the Bench (shorthand notes printed for the litigants, p. 107; 46 L. J. Ch. 538):—'We are always in the habit of listening with the greatest respect to any decision of the Supreme Court (meaning thereby the Supreme Court of the United States); but *we are not in the habit of hearing reports read of*

cases decided in our own Colonies; and there appears no reason why reports from the State Courts should stand higher.'"

This extract exhibits the same sort of ignorant egotism as that which recently caused the War Department to hesitate about accepting military aid from the Colonies unless the Colonial contingents were broken up into companies and these companies were scattered through the regular regiments; such a method of treatment might have been very useful in the way of introducing a leaven of intelligence into the regular regiments, but it would have been very detrimental to the Colonial contingents.

It is to be noticed that in the English Law Reports of cases appealed from Colonial Courts to the Judicial Committee of the Privy Council it is not deemed necessary to give any reference to the reports of those cases in the Courts below, while as a matter of course such references are given in connection with all English appeals to all appellate tribunals. This is a small matter, but it is in accord with the English views above extracted; it is a straw which shows how the wind blows.

A. H. MARSH.

Toronto.

The Late Lord Russell.

To the Editor of THE CANADIAN LAW TIMES.

SIR,—On reading in the English papers remarks made from the Bench and at the Bar upon the death of the late Lord Russell of Killowen, one cannot help being struck by the strong feelings of affection and regret manifested, but no less by the extreme conventionality and absence of anything worth remembering in the remarks themselves. There are possible exceptions in the expressions of Mr. Justice Darling and Sir Edward Clarke, the former of whom spoke of the late Chief Justice as a generous political opponent in two contested elections, while the latter said that he had known him as an opponent at the bar but always a friend,

and also emphasized his "intrepid desire that justice should be done." But on the whole the various tributes of Judges and leaders of the Bar seemed hardly worthy of the occasion. The journals, however, editorially supply the omissions, and do full honour to the departed—"as a great advocate, a great Judge, and a great man"—though not a great lawyer. A very interesting article in the Solicitors' Journal places him, in this threefold character, above Selborne, Cairns, Coleridge, Bowen, and Jessel, and indicates that Cockburn and Bramwell are the only men of our time who rank with him. After he went on the Bench he became an advocate of two important reforms; one, the enforcement of an Imperial duty, viz., instruction in the conflicting laws of the Empire as a part of legal education; and the other, a commercial reform, the ending by legislation of the direct or indirect bribery of agents to give orders in return for commissions. These were not unworthy of a great man. There can be no doubt of his superiority as an advocate, and as a Judge he seems to have greatly impressed his contemporaries with his marvellous grasp of complicated facts.

Yours, etc.

BARRISTER.

Toronto.

THE

CANADIAN LAW TIMES.

OCTOBER, 1900.

THE EXTINGUISHMENT OF EASEMENTS (*a*).

"'EXTINGUISHMENT' is properly used," says Mr. Challis in his excellent treatise upon the Law of Real Property (*b*), "to denote the annihilation of a collateral thing in the subject out of which it is derived, as of . . . an easement . . . in the land to which it relates." To discuss the nature of an easement, its incidents and characteristics, is obviously beyond the purview of the present article; yet it may serve a good purpose to merely recall some of its more salient distinctive features of origin and of mode of acquisition, which are of immediate importance in dealing with the subject of extinguishment.

Thus the term "natural easements" has been sometimes used to designate certain natural rights which are permanently incident to the ownership of corporeal property—inherent *ex jure naturæ*. These are susceptible of suspension, but not of extinguishment (*c*). They are not easements in the sense in which that word is strictly and properly applied by modern lawyers to incorporeal rights over servient, and incident to dominant, tenements, acquired by express or implied grant. Mr. Gale excludes these natural rights by defining easements to be "accessorial rights;" Mr. Goddard speaks of them as a "species of easements." Again, an easement, differing essentially from a mere licence, is not defeasible

(*a*) Mr. Gale in his excellent work on Easements, 7th ed., pp. 492-534, has treated this subject exhaustively. Mr. Goddard's work (Easements, 5th ed., pp. 523-566) likewise deals very fully with it. The writer freely acknowledges his indebtedness to both these distinguished authors for many of the ideas and most of the references in the present article.

(*b*) 2nd ed., p. 78.

(*c*) Wood v. Waud, 3 Ex. p. 775.

at the will of the grantor, actual or presumed, or of his successor in title (*d*). An easement does, a licence does not, imply a certain legal right or interest in land which must be respected by the grantor as well as by strangers (*e*). Inasmuch as from any attempt to confer an easement by word of mouth, or by writing unsealed, there will arise merely a licence, effective to a limited extent as against strangers (*f*), but generally, if executory (*g*) and not of an irrevocable character (*h*), liable to termination at the will of the grantor (*i*), though its revocation may give rise to an action for damages (*j*), in considering what is requisite to work an extinguishment, it is manifestly important in the first place to determine positively in each particular case that an easement has been actually created.

Easements, properly so called, are sometimes divided into two classes, — easements of necessity and easements not of necessity. The duration of the former is dependent upon the continuance of the necessity; but though extinguished upon the cessation of the necessity (*k*), they arise again should the necessity recur (*l*). This does not mean that the easement has been merely suspended, nor is it revival that occurs, as might be inferred from some early cases (*m*). In reality a fresh easement is created. Easements not of necessity, unless of a character limited in duration (*n*), or purpose (*o*), are not liable to extinction as are easements of necessity. This distinction or division of easements is, however, perhaps rather apparent than substantial.

(*d*) Rogers v. Duncan, 18 S. C. R. 710; 16 A. R. 3; 15 O. R. 699.

(*e*) Wood v. Leadbitter, 13 M. & W. 838; but see Kerrison v. Smith, [1897] 2 Q. B. 445.

(*f*) Whaley v. Laing, 2 H. & N. 476; S. C., 3 H. & N. 675.

(*g*) Winter v. Brockwell, 8 East 308.

(*h*) Wood v. Leadbitter, 13 M. & W. pp. 844-5.

(*i*) Fielder v. Bannister, 8 Gr. 257.

(*j*) Smart v. Jones, 33 L. J. C. P. 154; Kerrison v. Smith, [1897] 2 Q. B. 445.

(*k*) Holmes v. Goring, 2 Bing. 76.

(*l*) Pheysey v. Vicary, 16 M. & W. at p. 491.

(*m*) Buckley v. Coles, 5 Taunt. 809.

(*n*) Beddington v. Atlee, 35 Ch. D. 317 at pp. 323-4.

(*o*) National Guaranteed Manure Co. v. Donald, 4 H. & N. 8.

It is always important to bear in mind that easements exist only as incident to a dominant tenement, and over a servient tenement. There is no such thing as an easement in gross; nor is that an easement under which the public have rights. Yet there may be easements in favour of several dominant tenements over the same servient tenement. Of this the case of Semple v. London and Birmingham R. W. Co. (*p*) affords an example. Other divisions of easements may be suggested, but they do not appear to be material in considering questions of extinguishment.

A suspended easement, upon the cesser or removal of the cause of suspension, revives *proprio vigore* (*q*), whereas of an extinct easement, revival proper is not possible (*r*).

The destruction of an easement, even though it be not so stable as a right incident to the ownership of land *ex jure naturæ*, is by no means readily effected, nor is it favoured by courts of law or by statutory provisions. Thus, although the acquisition of incorporeal hereditaments of the class of easements, already provided for by prescription at common law, is further facilitated by a cumulative (*s*) provision of the Statute of Limitations (*t*), no similar means is available to make out a case of extinguishment. The Prescription Act affords no assistance here (*u*).

The books upon the law of easements specify several modes of extinguishment. A logical plan would appear to be a division into, first, extinguishment effected entirely independently of acts of the owners of the dominant or servient tenements, and, second, extinguishment effected, either (1) by the direct operation of the act or acts of the owner of the dominant tenement, or (2) by the operation of law, in the event of unity of seisin of the two tenements, or

(*p*) 9 Sim. 209.

(*q*) Thomas v. Thomas, 2 C. M. & R. 34.

(*r*) Whalley v. Tompson, 1 B. & P. 371; Aynsley v. Glover, L. R. 10 Ch. 283.

(*s*) Warrick v. Queen's College, Oxford, L. R. 6 Ch. 728; Dalton v. Angus, 6 App. Cas. 740, 814. But see Tapling v. Jones, 11 H. L. C. at p. 304.

(*t*) R. S. O. 1897 c. 37, ss. 34-39.

(*u*) Mykel v. Doyle, 45 U. C. R. 65; McKay v. Bruce, 20 O. R. p. 717.

upon the acts of the owners of one or both tenements held severally.

The first class or division embraces but few cases, and those of a comparatively simple kind, viz:—(1) extinction by act of God; (2) extinction by statute.

Though neither the English nor the Ontario reports furnish an instance of it (*v*), and the text books do not suggest any hypothetical case of this kind, it is readily conceivable that as a result of some great storm, or of a volcanic eruption, or from some other cause usually known to lawyers as *actus Dei*, the conditions of the dominant or servient tenement, or of both, should be so changed that the further enjoyment of an easement, theretofore appurtenant to the former, would become physically impossible. Although, if it should be probable, or even, humanly speaking, possible, that, by lapse of time, or by the use of artificial means, the relative conditions of the respective tenements might be so altered as again to render the enjoyment of the easement practicable, it would in the interval probably be deemed to be merely suspended, if the possibility of enjoyment of the easement at any future time be manifestly out of the question, humanly speaking, it is submitted that it must be deemed extinct.

Extinction by statute occurs whenever an Act of Parliament either expressly destroys an easement, or, as more frequently happens, requires or authorizes, whether directly or indirectly, the performance of something which is inconsistent with its continued existence (*w*). This class of case requires no comment.

Neither is it necessary to dwell upon the class of case in which the extinguishment is the direct result and purpose of the acts of the parties. That an express release, if under seal, will operate to extinguish any easement which the grantor was competent to relinquish is a proposition for which, according to Alderson, B., one cannot without pedantry cite authority (*x*). A parol disclaimer or a written in-

(*v*) But see Taylor v. Hampton, 4 McCord (S. Carolina) 96, 102.
(*w*) Mayor of Yarmouth v. Simmons, 10 Ch. D. 518.
(*x*) Wood v. Leadbitter, 13 M. & W. p. 842.

strument, purporting to be release of an easement, but not under seal, though ineffective at law as a release, may prove very valuable as evidence of an intention of abandonment in the light of which other acts, in themselves insufficient, may be held to have wrought an extinguishment. In equity, however, an easement may be lost or modified by written or verbal agreement (*y*).

But the cases in which extinguishment is the result of the operation of law upon acts of the parties, other than those in the nature of an express release, present difficulties as numerous as their variations and peculiarities, some of which we shall now proceed to consider.

Merger occurs, we are told, and operates either to extinguish or suspend an easement, when the dominant and servient tenements come into the same hands. That extinguishment should result, unity of seisin is requisite, that is, that in one person there should subsist an estate, equal in *quantum* and duration, in each of the tenements formerly dominant and servient respectively (*z*). Unity of possession or of ownership, where the estates are unequal, will merely result in a suspension of the easement, which, on severance, will revive (*a*). The law in this respect has long been settled (*b*).

We have incidentally alluded to those easements which are subject to extinguishment from some limitation inherent in themselves. They do not call for any further remark.

Extinguishment also happens where the dominant owner sanctions the doing upon the servient tenement of an act of a permanent nature, and such as will necessarily prevent the future enjoyment of the easement (*c*). This authorization, being merely a licence, need not be given by instrument under seal, and, as it passes no interest in land, does

(*y*) Craig v. Craig, 2 A. R. p. 588; Hervey v. Smith, 22 Beav. 299; Waterlow v. Bacon, L. R. 2 Eq. 514; Fisher v. Moon, 11 L. T. N. S. 623.

(*z*) Attrill v. Platt, 10 S. C. R. 425; Hart v. McMullen, 30 S. C. R. 245.

(*a*) Thomas v. Thomas, 2 C. M. & R. 34; Canham v. Fish, 1 Price's P. C. 148.

(*b*) Co. Litt. 113*a*.

(*c*) Gale on Easements, 7th ed., pp. 26, 489.

not fall within the Statute of Frauds (*d*). Though revocable while executory, once executed, such a license is irrevocable (*e*) and the easement is extinct (*f*).

Easements are frequently extinguished upon a presumption of a release, arising from non-user under such circumstances that an intention to abandon the right will be inferred. Lord Coke was clearly of opinion that non-user must be an interruption of the right, and not merely of the possession, in order to work an extinguishment of an easement (*g*). It is now quite well settled that mere non-user, if ascribable to any other reason than an intention to abandon, will not *per se* effect extinction (*h*). In one case 106 years' non-user, in another upwards of 20 years' non-user, and in another non-user for 30 years, were held insufficient, owing to circumstances negativing an intention to abandon (*i*). Again, non-user, though resulting from an adverse act of the owner of the servient tenement persisted in for 20 years, was held in Stokoe v. Singers (*j*) not to have extinguished an easement of light. The direction of the trial Judge that, unless the blocking up manifested an intention of permanent abandonment, or had caused the adjoining owner to alter his position on any reasonable belief that the lights in question were permanently abandoned, the jury should find the easement still subsisting, was held proper. In many other cases non-user for much shorter periods has been held ample, the circumstances indicating that such non-user was the result of an intention on the part of the owner of the dominant tenement to permanently abandon the easement (*k*). Thus in Moore v. Rawson (*l*) an easement of light

(*d*) Winter v. Brockwell, 8 East 308.

(*e*) Liggins v. Inge, 7 Bing. 682; Magee v. Mayor of St. John, 23 N. B. Reps. 275.

(*f*) Davies v. Marshall, 10 C. B. N. S. 697.

(*g*) Co. Litt. 114*b*.

(*h*) Crossley v. Lightowler, L. R. 3 Eq. 279; S. C., L. R. 2 Ch. 478; McLean v. Davis, 3 Allen (N. B.) 343.

(*i*) Seaman v. Vawdry, 16 Ves. 390; Lovell v. Smith, 3 C. B. N. S. 120; Cook v. Mayor of Bath, L. R. 6 Eq. 177.

(*j*) 8 E. & B. 31.

(*k*) Regina v. Chorley, 12 Q. B. 575.

(*l*) 3 B. & C. 332.

was held to have been destroyed by the owner of the dominant tenement erecting a blank wall where his lights had been and maintaining it for 17 years, the adjoining owner having built on his property on the faith of the other's intention to abandon his easement so manifested. Thus the law appears to be quite settled as stated in Crossley v. Lightowler (*m*): "The authorities upon the subject of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long continued suspension may render it necessary for the person claiming the right to shew that some indication was given during the period of non-user of his intention to preserve it. The question of abandonment of a right is one of intention to be decided upon the facts of each particular case. Previous decisions are only so far useful as they furnish principles applicable to every case of the kind. The case of Regina v. Chorley (*n*) shews that time is not a necessary element in a question of abandonment as it is in the case of the acquisition of right." As put in Regina v. Chorley (*o*) it has been made abundantly clear that "it is not so much the duration of the user as the nature of the act done by the grantee of the easement or the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury." Tindal, C.J., in Liggins v. Inge (*p*) said it would be a subject for inquiry by the jury whether the abandonment has been complete, or for a temporary purpose only. Again, it must be borne in mind that an interruption which may be quite sufficient to prevent the establishment of an easement where it is claimed under the Prescription Act (*q*), may not effect the destruction of an easement already in existence (*r*). But a dominant owner, who has ceased for a long period to enjoy his easement, under circumstances such that reasonable men would

(*m*) L. R. 2 Ch. at p. 482.
(*n*) 12 Q. B. 515.
(*o*) 12 Q. B. at p. 519.
(*p*) 7 Bing. p. 693.
(*q*) Smith v. Baxter [1900] 2 Ch. 138; Carr v. Forbes, 8 Q. B. 581.
(*r*) Knock v. Knock, 27 S. C. R. 664; Hollins v. Verney, 13 Q. B. D. 304.

assume that he intended permanent abandonment, cannot avoid the consequences of his conduct by giving evidence that his actual, but undisclosed and unapparent, intention was otherwise.

Non-user, though *per se* insufficient, is, therefore, if long continued, strong evidence of the existence of an intention to abandon. And, although the evidence from non-user may be insufficient to establish an intention on the part of the owner of the dominant tenement to permanently abandon sufficiently clear to effect an extinguishment, the onus of shewing the abandonment to have been temporary may be thereby cast upon him (*s*). If the non-user has been such as to give rise to a reasonable belief in the owner of the servient tenement that it was intended to permanently forego the right of easement, the dominant owner, "having given so far an encouragement to lay out money, on the assumption of that right not being used, should not be allowed at any period of time to resume his former right to the damage and injury of those who themselves have acquired a right of user, which the recurrence of the long disused easement will interfere with" (*t*).

In Stokoe v. Singers the question is raised but not settled, whether acts of the owner of the tenement *in quo*, even if indicative of permanent abandonment, will suffice to work an extinguishment without some act on the part of the owner of the tenement *a quo* based upon a supposed relinquishment. The language of earlier as well as later cases (*u*) would seem to make it clear that it is unnecessary to shew any such act of the owner of the servient tenement, where an intention to abandon, raising a presumption of release (*v*), is sufficiently proven by the conduct of the person entitled to the easement. Where this is not the case, however, acts of the owner of the servient tenement, done upon the faith of an abandonment, not unreasonably believed to

(*s*) Crossley v. Lightowler, L. R. 2 Ch. p. 482, quoted above.

(*t*) Crossley v. Lightowler, L. R. 3 Eq. p. 292; see, too, Stokoe v. Singers, 8 E. & B. 31; and Hart v. McMullen, 30 S. C. R. p. 253.

(*u*) Regina v. Chorley, 12 Q. B. 515; Cook v. Mayor of Bath, L. R. 6 Eq. 177; Bell v. Golding, 23 A. R. 485.

(*v*) Lovell v. Smith, 3 C. B. N. S. p. 127.

have been intended, and such that the easement cannot be re-asserted without injury to him, will, upon familiar grounds of estoppel, induce the Court to prevent such an unfair resumption of a right, though it should still legally subsist.

Cases may of course arise in which there are no surrounding circumstances to indicate whether or not the non-user was accompanied with an intention to abandon. Here the nature of the easement may throw some light on the matter. But the duration of the non-user is of course most material, and may be conclusive, unless there be something either in the nature of the easement or in the circumstances (as was the case in Seaman v. Vawdry (*w*), where there was non-user of a way for 106 years) to shew that, notwithstanding its long duration, such non-user is attributable to some sufficient reason other than an intention to abandon (*x*).

Mr. Goddard (*y*) states that easements "can never be extinguished or abridged by the act of the servient owner." It is, no doubt, meant that without acquiescence by the dominant owner, extinguishment will not ensue. This statement is certainly accurate (*z*). But it is clear from the very authority cited by Mr. Goddard, Selby v. Nettleford (*a*), that, with such acquiescence, the easement may be materially abridged; and it is equally clear that an act of the servient owner inconsistent with its enjoyment, not objected to by the person entitled to the easement, is strong evidence against its survival; and such acts, acquiesced in, constantly work extinguishments (*b*). Of course it may well be said that it is the acquiescence of the owner of the easement, evidencing his intention to abandon, which effects the extinguishment, and it would seem reasonable that, inasmuch as user by one owner which another cannot physically pre-

(*w*) 16 Ves. 390.

(*x*) Ward v. Ward, 7 Ex. 838; Cook v. Mayor of Bath, L. R. 6 Eq. 177; Davis v. Morgan, 4 B. & C. 8; Hale v. Oldroyd, 14 M. & W. 789.

(*y*) Easements, 5th ed., p. 526.

(*z*) Norbury v. Meade, 3 Bligh p. 245; Harvie v. Rogers, 3 Bligh N. S. 440.

(*a*) L. R. 9 Ch. 111.

(*b*) Bell v. Golding, 23 A. R. 485.

vent, and which does not give rise to a cause of action, cannot be relied upon to establish an easement (*c*), acts of a servient owner, as to which the dominant owner is in a like position, cannot be said to destroy the latter's easement. But acts which might be restrained (*d*) will, if allowed to pass, with knowledge and without protest, or unopposed, be convincing evidence of an intention to renounce the easement thereby affected.

In the case of easements which are from their nature intermitttent in their enjoyment, it is more difficult than in the case of continuous easements to determine when a cessation of user amounts to an abandonment. It would appear that, in the absence of a disclaimer or other clear indication of intent to abandon, non-user, even for a period of 20 years or upwards, cannot be relied upon as effecting extinguishment. Mr. Gale (*e*) reaches this conclusion upon such authorities as Moore v. Rawson (*f*), Ward v. Ward (*g*), James v. Stevenson (*h*), and Hall v. Swift (*i*).

It is sometimes said that extinguishment results from the establishment of an inconsistent easement. That inconsistent easements cannot co-exist is obvious (*j*). It is equally clear that the existence of an easement prevents, until it is extinguished, the acquisition, whether by grant or prescription, of any other easement inconsistent with it. But a constant adverse user, inconsistent with the enjoyment of an existing easement, which, if acquiesced in, will suffice to raise a presumption of abandonment, may itself establish a prescriptive right. This latter easement only comes into being, however, when, or after, the previous right has ceased to exist.

Very nice questions often arise where it is sought to make out a case of extinguishment because of a substantial

(*c*) Sturges v. Bridgeman, 11 Ch. D. 852; Bright v. Walker 1 C. M & R. 211; Backus v. Smith, 5 A. R. 341.

(*d*) Ecclesiastical Commissioners v. Kino, 14 Ch. D. 213.

(*e*) Easements, 7th ed., p. 527.

(*f*) 8 B. & C. 339.

(*g*) 7 Ex. 838.

(*h*) [1893] A. C. 162.

(*i*) 4 Bing. N. C. 381.

(*j*) Goddard on Easements, 4th ed., p. 32.

alteration of a permanent kind in the dominant tenement, or in the mode of enjoyment of the easement itself. Where the alteration has been merely trivial the right to the easement is not thereby affected (*k*). Only a substantial alteration tantamount to an abandonment will suffice to extinguish. That was clearly settled, after some dispute, by the decision in Scott v. Pape (*l*), followed in Greenwood v. Hornsey (*m*). In Scott v. Pape, a case of easement of light, Cotton, L.J., (*n*) thus lays down the law on this point:—"What alteration, then, will deprive the plaintiff of his right,—this right which can be claimed only in respect of a dwelling house, workshop, or other building? Will the alteration of the purpose or object for which the building is to be used, as the conversion of a workshop into a house, or of a house into a workshop, have this effect? It will not: that is definitely settled by the case of Ecclesiastical Commissioners v. Kino (*o*). The old building there was a church, and that which was to be built upon the site of the church was a warehouse—an entire alteration of the purposes and of the character of the building. Then will moving back the plane of the wall deprive the plaintiff of his right? In my opinion, no. It is difficult to see how the mere fact of moving back can do so, and in fact there is authority against such a proposition. Then, if moving it back will not, will simply moving it forward have this effect? In my opinion, both the moving back and the moving forward may destroy the right, because the new building, when constructed, may, either by being substantially advanced or substantially set back, be so placed that the light which formerly went back into the old windows will not go into the new. If a building is set back, say 100 feet, it will not enjoy the same cone of light that was enjoyed before, but will have an entirely different cone, and it may be moved so far forward that it will not enjoy the same light as that enjoyed by the old building. In my opinion, the question to

(*k*) Harvey v. Walters, L. R. 8 C. P. p. 166.
(*l*) 31 Ch. D. 554.
(*m*) 33 Ch. D. 471.
(*n*) 31 Ch. D. p. 569.
(*o*) 14 Ch. D. 213.

be considered is this, whether the alteration is of such a nature as to preclude the plaintiff from alleging that he is using through the new aperture in the new wall the same cone of light, or a substantial part of that cone of light, which went into the old building. If that is established, although the right must be claimed in respect of a building, it may be claimed in respect of any building which is substantially enjoying a part or the whole of the light which went through the old aperture." So too it is clear that, except in the case of an easement which exists only for a strictly limited purpose, no change in the use to which the owner puts his right, not increasing the burden on the servient tenement (*p*), short of an essential alteration in the character of the right itself (*q*), will suffice to destroy the easement, or even to give the owner of the servient tenement safe ground upon which to complain of or to seek to restrain such change (*r*). But the rule is well established that the measure of the easement is its extent at the time it was acquired (*s*); and it is only where the enjoyment of the easement to its legitimate extent will be interfered with or prevented by an obstruction to the encroachment that the servient owner is, out of respect for the pre-existing easement, obliged to submit to the encroachment (*t*), and then only, as already stated, if such encroachment does not, unless merely to a trifling extent, increase the burden upon the servient tenement. Otherwise he may obstruct or oppose the encroachment in every legitimate way. This is clear from authorities already referred to. But no mere encroachment or attempt to increase the easement, not amounting to an alteration evincing an intention to forego or abandon the ancient right (*u*), unless it substantially increases the

(*p*) Watts v. Kelson, L. R. 6 Ch. 166.

(*q*) Clarke v. Somersetshire Drainage Commissioners, 57 L. J. M. C. 96; Williams v. James, L. R. 2 C. P. p. 582; Wimbledon and Putney Common Conservators v. Dixon, 1 Ch. D. 362.

(*r*) Saunders v. Newman, 1 B. & Ald. 258; Thomas v. Thomas, 2 C. M. & R. 34; Buxendale v. McMurray, L. R. 2 Ch. 790; South Metropolitan Cemetery Co. v. Eden, 16 C. B. 42.

(*s*) Heward v. Jackson, 21 Gr. 263; McNab v. Adamson, 6 U. C. R. 100.

(*t*) Tapling v. Jones, 11 H. L. C. 290; Chandler v. Thompson, 3 Camp. 80.

(*u*) Newson v. Pender, 27 Ch. D. 43.

burden of the servient tenement, and is permanently inseparable from the easement rightfully enjoyed, can *per se* work an extinguishment. Nor will an encroachment by the owner of the easement, such as the alteration of the size of a window, or the opening of a new window, affect the right of the owner of the easement to its enjoyment(*v*). Such an alteration, if it amounts to an abandonment, or substantially changes the character of the easement, may of course suffice to do so (*w*). Moreover, no increase in the burden upon the servient tenement need be submitted to (*x*). Where the additional burden and its cause can be separated from the established easement the former may be obstructed, or, if it give rise to a cause of action, restrained, while the latter remains unimpaired; but when easement and encroachment are inseparable, and the alteration is of a permanent character and the increased burden substantial, it would appear that the easement itself may be thereby forfeited.

Mr. Goddard (*y*) appears to think that a slight alteration in the case of an easement of light originating in grant, actual or implied, may cause its destruction, whereas a like alteration would not have this effect if the easement existed by virtue of the Prescription Act. But the principles enunciated in Tapling v. Jones and Scott v. Pape seem to apply as well to easements created by grant as to those arising from prescription. Whatever the difference in the mode of acquisition, and although an interruption, sufficient to defeat an attempt to establish title under the Prescription Act, might prove innocuous if the claim can be laid at common law, once an indefeasible easement exists (*z*), what will

(*v*) Aynsley v. Glover, L. R. 10 Ch. 283; Barnes v. Loach, 4 Q. B. D. 494.

(*w*) Heath v. Bucknell, L. R. 8 Eq. 1; see comment on this case in Straight v. Burn, L. R. 5 Ch. p. 166; Newson v. Pender, 27 Ch. D. 43; Pendarves v. Munro, [1892] 1 Ch. 611.

(*x*) McNab v. Adamson, 6 U. C. R. 100.

(*y*) Easements, 5th ed., pp. 555-559.

(*z*) The Imperial statute 2 & 3 W. IV. c. 71, s. 3, (R. S. O. 1877 c. 108, s. 36) having been repealed in Ontario by 43 V. c. 14, s. 1, as to all rights not acquired by 20 years' user prior to the 5th day of March, 1880, this question can only arise here as to easements of light existing prior to that date, which would be governed by the repealed law. Under the former statutory provision an easement of light thereby acquired is indefeasible. Where the easement created by grant, express or

destroy it in the one case should extinguish it in the other (*a*). The decision in Tapling v. Jones (*b*), though a case in which the easement was in the House of Lords said to be properly founded upon the Prescription Act, is certainly based upon principles which logically cover equally well a case of easement by grant; and though both Mr. Gale and Mr. Goddard seem to think it doubtful whether or not Blanchard v. Bridges (*c*) is overruled by Tapling v. Jones, the former is apparently inclined to the view that it is (*d*), and the latter says "it is questionable whether the judgment would be followed at the present day" (*e*).

Although in an action to restrain the obstruction of ancient lights in respect of premises which have been rebuilt, evidence of the plaintiff's intention to preserve ancient lights in such rebuilding is unnecessary (*f*), the dominant owner reconstructing must at his peril preserve clear and definite evidence of the nature and extent of his easement in its former condition (*g*).

From the fact that easements always exist for the benefit of the dominant tenement it follows that, no matter how long the enjoyment may have been, the owner of that tenement may at any time abandon or cease to use his right, and the servient owner never acquires a right to insist upon its continued exercise (*h*).

implied, is limited in purpose, it of course stands on a different footing. Upon such an easement a slight alteration may have an effect which it would not have were the easement not so restricted—and this because of the inherent limitation rather than because the easement arose from grant and not by prescription.

(*a*) Mason v. Shrewsbury and Hereford R. W. Co., L. R. 6 Q. B. p. 587.

(*b*) 11 H. L. C. at p. 304.

(*c*) 4 A. & E. 176.

(*d*) Easements, 7th ed., p. 502. But see National Provident Plate Glass Ins. Co. v. Prudential Assurance Co., 6 Ch. D. 757, at p. 767.

(*e*) Easements, 5th ed., p. 555; see Barnes v. Loach, 4 Q. B. D. 494.

(*f*) Smith v. Baxter, [1900] 2 Ch. 138.

(*g*) Gale on Easements, 7th ed., p. 524; Pendarves v. Munro, [1892] 1 Ch. 611; Fowlers v. Walker, 49 L. J. Ch. 598; 51 L. J. Ch. 443; 42 L. T. N. S. 356.

(*h*) Oliver v. Lockie, 26 O. R. 28, 34; Mason v. Shrewsbury and Hereford R. W. Co., L. R. 6 Q. B. 578.

The foregoing leading principles to be drawn from the authorities upon the extinguishment of easements make it reasonably clear that, although the law is strict in requiring conclusive evidence of their establishment because they are in derogation of natural rights, it protects these incorporeal rights once acquired from infringement and destruction just as scrupulously as it does property of a corporeal kind, recognizing that the loss of an easement is "a permanent injury to the inheritance."

FRANK A. ANGLIN.

Toronto, September 26th, 1900.

AMENDMENTS TO THE CRIMINAL CODE.

The Criminal Code came into effect on the 1st July, 1893, seven years ago. Since that date it has been amended as follows:

1893, c. 32, from 1st April, 1893.
1894, c. 57, from 23rd July, 1894.
c. 58, from 23rd July, 1894.
1895, c. 40, from 22nd July, 1895.
1899, c. 46, from 11th August, 1899.
c. 47, from 11th August, 1899.
1900, c. 46, from 1st January, 1901.

Of the above, c. 58 of 1894 and c. 47 of 1899 are separate enactments relating to criminal matters partly amending the Code. They cannot, therefore, be overlooked. Chapter 58 relates to the trial of juvenile offenders and c. 47 relates to the administration of justice in the districts north of Ontario and Quebec and east of Manitoba and Keewatin; thus again justifying Lord Dufferin when he said that the Queen's writs ran to the North Pole.

The amendments of last session are so varied and important that the time seems opportune for calling attention to the changes which have been made in the Code from its coming into operation to date. It must be remembered that amendments under 1900 c. 46 do not come into force until the 1st January, 1901.

The Code is divided into three main divisions:

(1) Introduction: Title I. (Parts I.-111.);

(2) Offences: Titles II.-VI. (Parts IV.-XL.);

(3) Procedure: Titles VII.-IX. (Parts XLI.-LXVII.); closing with repealing clauses and forms.

Except to persons actually engaged in the administration of the criminal law, the knowledge of the third of the above divisions (Procedure) is not of so much consequence. The members of the legal profession, or rather those members who make a specialty of criminal cases, require a knowledge

of all divisions; but the definitions of offences and the punishments provided for them are a subject of more interest to every citizen.

The simplest plan to adopt is to follow the order of the Code and state the amendments made to the various sections by either giving the effect of the amendment or printing verbatim the amending law.

(1) PRELIMINARY PROVISIONS.

In this division no amendment has been made of consequence. The Court of Appeal for Ontario is substituted for the Divisional Courts of the High Court of Justice as the Court of Appeal for that Province in criminal matters: (1900, c. 46).

(2) OFFENCES.

In this division the alterations are considerable. We will take them seriatim.

Section 65. Treason; verbal amendment only (1894, c. 57).

Section 133. Fraud upon the Government, made an indictable offence (1893, c. 32).

Section 166. Assisting escapes — new section, 166 A. (1900, c. 46).

"166 A. Everyone is guilty of an indictable offence and liable to one year's imprisonment, who, by failing to perform any legal duty, permits a person in his lawful custody on a criminal charge to escape therefrom."

This wording is very wide. Taschereau, p. 112, remarks that the original section did not provide for the offence of a negligent escape by a sheriff or gaoler, as s. 7 of the repealed statute did. It will be covered by the amendment.

Section 179. Publishing obscene matter—amended 1900, c. 46.

Every person is now declared guilty of the offence who "manufactures, or sells, or exposes for public sale or to public view, or distributes or circulates, or causes to be distributed or circulated any obscene book, or other printed, typewritten, or otherwise written matter," etc., "tending to corrupt morals."

The amendment covers modes of publication not mentioned in the original section, e.g., by phonograph.

Quack medicine vendors who advertise female pills will be more easily reached by a further amendment which attacks them if they advertise nostrums causing modes of relief not originally mentioned in the Code.

As a defence, the accused may prove not only that the public good was served, but also that there was no excess beyond what the public good required. This latter element is new.

Section 180. Posting immoral books, etc., is extended to "scurrillous" matter. (1900, c. 46).

Section 183. Seduction of a ward, servant, etc. The employment was formerly in a "factory, mill, or workship;" now a "shop or store" is added. The receiving of wages or salary directly or indirectly is also made one of the *indicia* of "employment." (1900, c. 46).

The burden of proof of previous unchastity is thrown on the accused.

Taschereau, on the original section, says: "The offence by an employer on his employee is seduction; the illicit connection must have been with a woman of a previously chaste character. Through an error, however, as the section reads, there is no offence whatever of the kind provided for."

Section 187. The age of protection to the female under this section is extended to eighteen. (1900, c. 46).

Section 189. Offences against idiots. If the offender knew or had good reason to believe that imbecility existed, he will be liable to be convicted. (1900, c. 46).

Section 196. Common gaming house. The Code made a gaming house of any place where persons resorted to play any game of chance. By 1895, c. 40, this wording was extended to any "mixed game of chance or skill." By the same Act the playing and the stakes may be partly in such house and partly elsewhere. It has lately been discovered in Hamilton that poker is a mixed game of skill and chance. There are several other places in Canada where that fact was already known through knowledge acquired at some expense.

On sections 197 and 198, cognate subjects, see Regina v. Giles, 26 O. R. 586; Regina v. Wettman, 25 O. R. 459.

Section 205. Lotteries. After the 1st January, 1901, raffles for "religious" as well as "charitable" objects will not be an offence. The distribution of "works of art" by lot among the members or ticket-holders of incorporated societies will after such date also no longer be excepted from the Code. It will be remembered that this amendment was most vigorously discussed during the session. The workers in the field of art found champions in Parliament. See Regina v. Lorraine, 28 O. R. 123, 2 Can. Crim. Cas. 144.

Section 207. Vagrancy. The celebrated clause (*a*) making every one a vagrant who "not having any visible means of maintaining himself, lives without employment," is by 1900, c. 46, amended to read as follows:—

"(*a*). Not having any visible means of subsistence, is found wandering abroad or lodging in any barn or outhouse, or in any deserted or unoccupied building, or in any cart or waggon, or in any railway carriage or freight car, or in any railway building, and not giving a good account of himself, or who, not having any visible means of maintaining himself, lives without employment."

At the end of s. 208 this proviso is added:

"Provided that no aged or infirm person shall be convicted as a loose, idle or disorderly person or vagrant for any reason coming within paragraph (*a*) of section 207, in the county of which he has for the two years immediately preceding been a resident."

On the present clause see Regina v. Organ, 11 P. R. 797; Regina v. Bassett, 10 P. R. 386.

By 1894, c. 57, "Public Place" was defined as "any open place to which the public have or are permitted to have access and any place of public resort."

Section 210. Duty of head of family to provide necessaries.

The word "guardian" in this section and also in sections 183, 186, and 284, is defined (1900, c. 46) as "any person who has in law or in fact the custody or control of the girl or child."

Until 1893 offences under ss. 209, 210, and 211 were only punishable with three years' imprisonment. By c. 32 of 1893, if the act amount to "culpable homicide" the offender is apparently punishable for that offence.

See Regina v. Robinson, 28 O. R. 407, 1 Can. Crim. Cas. 28, agreement between husband and wife; also Regina v. Holmes, 29 O. R. 362, 2 Can. Crim. Cas. 131, as to proof of marriage; as to non-support of wife under s. 307 (6), see Regina v. Leclair, 297 *ib.*

Sections 254, 256. Verbal amendments, 1893, c. 32.

Section 260. Indecent assaults on males. Punishment by 1893, c. 32, increased to ten years. Also, the word "intent" substituted for the word "attempt," correcting a printer's error in the Code.

As to liability of minor to punishment, see Regina v. Hartlen, 30 N. S. Reps. 317, 2 Can. Crim. Cas. 12.

Section 264. Kidnapping. By 1900 c. 46, re-arranged, but not altered.

Sec. 278. Polygamy. By 1900, c. 46, re-arranged but not altered.

Section 284. Stealing children. See s. 10 above.

Section 285. Defamatory libel.

The amendment of 1900, c. 46, is more curious than useful.

The definition under the section before amendment was: "A defamatory libel is matter published without legal justification or excuse likely to injure the reputation of any person by exposing him to hatred, contempt, or ridicule or designed to insult the person to whom it is published." Therefore it was not lawful to hurt the feelings of A by libelling B. 1900, c. 46, amends the section in this manner: "or designed to insult the person of or concerning whom it is published." It is therefore possible now to insult A by criticising B, so long as you do not bring yourself within the first part of s. 285. See Regina v. Cameron, 2 Can. Crim. Cas. 173, as to requisites for indictments; also Regina v. Grenier, *ib.* 204, as to quality of offence.

The question as to libelling the dead is discussed in Odgers on Libel and Slander, p. 422. The author seems to think it

can be punished as a misdemeanour. The amendment seems effectually to settle the question for Canada in the negative.*

Section 306. Theft of things under seizure.

Everyone is guilty of the offence who takes away, etc., without lawful authority, any property "under lawful seizure and detention." Therefore, if property is seized and held by a bailiff under distress for rent or under seizure by an agent of a chattel mortgagee or lien-holder, no person can take it from them without infringing the section. The amendment (1900, c. 46) adds to the section this limitation: the lawful seizure and detention must be "by any peace officer or public officer in his official capacity." By s. 3 (s), the expression "peace officer" includes a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, and justice of the peace, and also the warden, keeper or guard of a penitentiary and the gaoler or keeper of any prison, and any police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace, or for the service or execution of civil process. "Public officer" by clause (*w*) of s. 3 means "any inland revenue or customs officer, officer of the army, navy, marine, militia, North-west mounted police, or other officer engaged in enforcing the law relating to the revenue, customs, trade or navigation of Canada." Therefore you will soon be able to take goods under seizure from the bailiff or agent acting for a private party without coming within this section, although you may be liable under s. 305 to a charge of theft.

Landlord: Regina v. Hollingsworth, 2 Can. Crim. Cas. 291.

Section 331. Stealing cattle. Section 331 made stealing cattle an offence. Section 331 (*a*), a new section (1900, c. 46), to three years of imprisonment who, without the consent of the owner, fraudulently misappropriates stray cattle or fraudulently obliterates or imitates brands on cattle, or makes every one guilty of an indictable offence and liable

*The right is well recognized in French law. The action brought in 1857 by the three surviving daughters of Eugène de Beauharnois, Viceroy of Italy. Napoleon's step-son, is a striking and interesting instance. See the Romance of Prince Eugène, by Albert Pulitzer—Trans. London, 1895. History has not followed the favourable decision of the Imperial Court of Appeal.

lastly, without reasonable cause, refuses to deliver cattle to the owner or his agent. This is a new offence.

Section 332. Theft of dogs, birds, beasts, and other animals.

Under this section offenders were liable to a penalty not exceeding $20 over and above the value of the property stolen or to one month's imprisonment with hard labour. Under the new section (1900, c. 46), if the value of the property stolen exceeds $20, the offender is guilty of an indictable offence and liable to a penalty not exceeding $50 over and above the value of the property stolen, or to two years' imprisonment, or to both. If the value of the property stolen does not exceed $20, the former law stands good. Increased punishment is also provided for a second offence, upon summary conviction.

Section 410. Burglary.

The definition of the crime is unchanged, but by 1900, c. 46, the following addition is made to the punishment: "Everyone convicted of an offence under this section who when arrested, or when he committed such offence, had upon his person an offensive weapon, shall, in addition to the imprisonment above prescribed, be liable to be whipped."

Section 449 provides for the offence of selling bottles marked with a trade-mark, without the consent of the owner. The former section is repealed and a new one substituted. The substituted section (1900, c. 46) provides that everyone is guilty of an indictable offence who,

(*a*) Without the consent of the owner of a registered trade-mark, wilfully defaces, conceals, or removes such trade-mark; or

(*b*) Being a manufacturer, dealer or trader, or a bottler, without the written consent of the owner of a registered trade-mark, trades or traffics in any bottle having on it such trade-mark.

The attention of "rags and bottles" is respectfully called to this section.

It is further provided that the onus of proving the lawfulness of the transaction is upon the accused, being a manufacturer, dealer, trader, or junk-dealer.

By section 479 the expression "counterfeit token of value" is defined. To the former definition the following is now added:—"Includes also any coin or paper money, which although genuine has no value as money, but in the case of such last mentioned coin or paper money it is necessary in order to constitute an offence under this part that there should be knowledge on the part of the person charged that such coin or paper money was of no value as money, and a fraudulent intent on his part in his dealings with or with respect to the same." (1900, c. 46).

The gentlemen who pass Confederate bills or the bills of extinct banks are notified of this change in the law.

The section finishes another instance of an intent being required to constitute a crime under the Code.

See Regina v. Attwood, 20 O. R. 574.

Section 507 relates to injuries to fences, walls, or boundaries.

By 1893, c. 32, a new section 507 (*a*) was added making guilty of an offence, and liable to a penalty not exceeding $50, any person unlawfully removing material from any harbour, bar, or natural protection to a harbour.

Section 512. Cruelty to animals.

By 1895, c. 40, cruelty to any wild animal or bird in captivity was made an offence under the section. Domestic animals or birds were originally alone mentioned.

Section 520. Combinations in restraint of trade.

The clause is left as it was, except that the word "unlawfully" is struck out, and the following exception is added:

"Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees."

The above are all the alterations to date in the substantive matter of crimes and offences. The remaining provisions of the Code relate to procedure and will form the subject of a separate paper. The alterations will be found important.

R. E. KINGSFORD.

Toronto.

EDITORIAL REVIEW.

Sunday Shaving.

In 1882 the Common Pleas Division of the High Court for Ontario decided, in Regina v. Taylor, that it was unlawful for a barber to shave his customers on Sunday. The case is not reported, for the reason, if our recollection is not astray, that the original opinions of the Judges were lost or mislaid. It was a case which excited a good deal of attention at the time it was decided, and it has probably been regarded and followed by magistrates ever since. From an interesting article in the *Canada Law Journal*, vol. xviii., p. 190, it appears that the Court decided that a barber is a workman within the meaning of the Lord's Day Act, and that shaving is a worldly labour or work done by him in the course of his ordinary calling as a barber, and is not a work of necessity or charity. On the latter point the Court seems to have followed Phillips v. Innes (1837), 4 Cl. & F. 234, a decision of the House of Lords in a Scottish case. Recently, however, a Divisional Court in England, in Palmer v. Snow, [1900] 1 Q. B. 725, has decided that a barber is not a "tradesman, artificer, workman, or labourer, or other person whatsoever," within the meaning of 29 Car. II. c. 7, s. 1. The exception as to works of necessity and charity is not touched upon. But Phillips v. Innes was relied upon by counsel in argument for the proposition that a barber, if not a tradesman, came within the other words of the statute. Channell, J., pointed out the distinction in the Scottish Act, which begins with the statement that "no handy-labouring or working be used on the Sunday," and said that a barber might well come within that enactment, but was not within the English Act. "Tradesman," he considered, means "a person carrying on a trade—buying and selling." "Artificer" means a person who makes something. "Workman" and "labourer" mean persons in employment: Regina v. Sylvester (1864), 33 L. J. (M. C.) 79. "Other person whatsoever" must be *ejusdem generis* as the persons named. Both the Judges composing the Court (Channell and Bucknill, JJ.).

alluded to the fact that when the 29 Car. II. was passed, a barber was a more important person than he now is. The Ontario Act to prevent the profanation of the Lord's Day mentions "merchant," "farmer," "mechanic," as well as the persons named in the English Act. It may be that "merchant" occurring before "tradesman" indicates that the latter word is used in another sense, or that "mechanic" includes a barber. "Farmer" was not inserted till 1896, but "merchant" and "mechanic" were in the statute in 1882, when Regina v. Taylor was decided. In that case, however, if we are not mistaken, the late Mr. Chief Justice Wilson selected "workman" as the word which included a barber, and if so the case would be opposed to the recent English case as well as to the older one decided in 1864, which was probably not cited to the Common Pleas. Many person will share the doubt of Mr. Justice Osler in the Taylor case, whether shaving is not really a work of necessity, in any fair view of the shifting meaning of that term. He, however, felt bound on that point by the House of Lords case. The question of the lawfulness of Sunday shaving is certainly not free from difficulty.

The Decadence of Manners.

The "silly season," as the hot weather period is sometimes termed, has brought forth several newspaper laments on this tolerably well-worn topic. The grand manner has gone forever, and there be few that mourn it. But even the common courtesies and decencies of life seem to be in danger of abandonment by the classes which formerly cherished them. The members of the Bar, a conservative body, cling to certain observances in public, but in private there is too much reason to believe that they are no better than the rest of mankind. One thing we miss is the deference which used to be paid by the younger to the older members of the profession. Perhaps the seniors were not always very gracious to the juniors, but the tables are now turned with a vengeance! A lecturer on manners would be a valuable addition to the staff of the Law School at Osgoode Hall. Good manners can perhaps never be thoroughly learned, if they are

not learned at home; but a knowledge of, and consideration for, the rights of others should lead a thoughtful person to the habitual practice of courtesy.

University of Toronto Law Professorships.

Mr. A. H. Frazer Lefroy, who acted as Professor of Roman Law in the University of Toronto during the latter part of the last session, has now been regularly appointed to the chair in place of the Hon. William Proudfoot, resigned, and Mr. McGregor Young has been appointed to the chair of Constitutional and International Law, which has just been vacated by the Hon. David Mills. The new professors are both members of the Toronto Bar, and, though they are not so widely known as their eminent predecessors, each has a reputation for learning and the ability to communicate knowledge which amply justifies their selection.

Parties to Action—Trade-Union.

In England it was held by Mr. Justice Farwell on the 5th September last in Taff Vale Railway Co. v. Amalgamated Society of Railway Servants, 44 Sol. J. 714, that a trade union, an unincorporated association, is capable of being made a defendant in an action of tort, and, to the extent of its funds, is responsible for wrongful acts committed by its agents, and further, that it can be restrained by injunction from allowing such acts to be committeed. The capacity to sue or be sued is a result of the statutory capacity to hold property.

Flowers at Funerals.

To the singular questions, says the Albany Law Journal, which the Courts have been compelled to pass upon must be added the query whether the purchase of flowers is one of the necessary expenditures at a funeral. The case, which was recently decided by the Appellate Division of the Supreme Court of Rhode Island, was that of Frank O'Reilly v. Charles J. Kelly, administrator, in assumpsit, for flowers ordered for the funeral of James Monaghan, the defendant's intestate, upon the order of Charlotte Campbell, a sister-in-law of the intestate and his housekeeper for eighteen years.

It appears that Monaghan left $4,000 worth of real estate and an insurance policy of $2,000 and no will. When an effort was made to collect $15 for flowers, the administrator refused to pay, and the case was carried to the District Court of the tenth judicial district. There the plaintiff was nonsuited on the ground that flowers were not necessary. He took the case up to the Appellate Court on a bill of exceptions to have the ruling reviewed, and the result is a decision that the ruling of the Court below was erroneous. The opinion of the Supreme Court was delivered at great length by Judge Tillinghast. After commenting on the fact that the deceased left no one in particular to look after his funeral, Judge Tillinghast says, as reported by the Albany Argus, that it seemed eminently proper that his sister-in-law, who had kept house for him for so many years, should have something to say about the funeral arrangements. In regard to the ordering of the flowers, the Judge says: "The custom of having flowers at funerals is now well-nigh universal in this country, and, when not abused by extravagance or unseemly ostentation, is certainly to be commended as giving appropriate expression to our feelings of respect and love for the departed. It is true that, strictly speaking, flowers are not necessary on such occasions, but, like many other things of which the same might be said, they are certainly appropriate and in harmony with the better feelings and sentiments of our common humanity. And we think it is clear that in the case at Bar the housekeeper of the intestate, under the circumstances above mentioned, was warranted in ordering, upon the credit of the estate, the flowers in question." Furthermore, Judge Tillinghast observed that it is not customary for the administrator to be appointed before the burial of the intestate, and that, if every individual thought that he was likely to be called upon personally to bear the expense of the funeral if he should undertake to superintend matters, the injunction to "let the dead bury the dead" might be literally obeyed.

Discovery in Actions.

Two decisions of the present year in England on the subject of discovery are of general importance. In Milbank

v. Milbank, [1900] 1 Ch. 376, the Court of Appeal required a litigant to give particulars of certain transactions, the documents relating to which had previously been held to be privileged from production, laying it down that the right to particulars is quite a different thing from a right to production. It would seem that particulars in an action are not really ordered by way of discovery, but as supplementary to or a substitute for pleading. A different kind of question came up in Regina v. Bullivant, [1900] 2 Q. B. 163, where the Court of Appeal held that the privilege granted in respect of confidential letters between a solicitor and client does not extend to communications coming into existence when the client was looking for advice for the purpose of evading a statute imposing a duty on property.

The Need for a New Judge.

Up to the time of going to press no news has come of the appointment of a gentleman to fill the office of a puisne Judge in the Queen's Bench Division, Ontario, and arrangements have been made by the other Judges for supplying the place on circuit of Mr. Justice ——, as that hypothetical person, the new incumbent, is termed in the published lists. A Divisional Court, also, has sat without him. Notwithstanding this, a new Judge is needed, and the appointment should not be delayed. If the work of the High Court should ever be slack, there is plenty to do in the Court of Appeal, where an *ad hoc* Judge is often much in request.

The New Court House at Toronto.

An important event in Toronto was the opening on the 10th September last, for public use, of the court rooms in the new municipal buildings at Toronto. There are four court rooms—spacious and beautiful apartments—with other rooms adjoining fitted for the use of Judges, jurors, witnesses, barristers, and solicitors. The furnishings are in excellent taste. The opening day brought forth some congratulatory remarks from Mr. Justice Rose and Mr. Æmilius Irving, Treasurer of the Law Society, speaking for the Bar, both of whom hailed the day as an historical one. Mr. Irving's memory went back to a court house at the corner of King and Church

streets, which was in use before the one in Adelaide street lately vacated. Living persons—Mr. Clarke Gamble, Q.C., was instanced—however, can remember a still older court house in Richmond street. The new building is therefore at least the fourth possessed by Toronto. Will there ever be occasion for a fifth? Or shall law and lawyers die, and these new rooms be turned into picture galleries?

Money in Court—Proof of Majority.

For an example of a very strict ruling as to the proof required of the age of a person applying for payment of money out of Court, vide Tolton v. MacGregor in the current number of the OCCASIONAL NOTES, p. 391. This was a case of a person applying, upon attaining his majority, for his own money, not of a litigant endeavouring to get possession of money in dispute in a contentious cause. The administrative business of the Court is not usually conducted with such rigour. It has been sometimes thought that too great laxity in matters of this kind has prevailed. This is going to the other extreme.

Equitable Execution.

Besides the interest attaching to the decision in Stewart v. Jones, in the currrent number of the OCCASIONAL NOTES, p. 380, as working a kind of equitable attachment of a debt due by the Crown, it has the, perhaps doubtful, merit of recalling a half-forgotten controversy as to whether a receiver when appointed to get in a fund, not reachable by ordinary process, to satisfy a judgment, was or was not obliged to distribute it ratably among the creditors of the judgment debtor in accordance with the provisions of the Creditors' Relief Act. This question was very fully discussed in a leading article in 9 C. L. T. 145, 152. The conflict of judicial opinion is shewn by reference to Dawson v. Moffatt, 11 O. R. 484; Kirk v. Burgess, 15 O. R. 608; Sylvester v. McEachon, 9 Occ. N. 138; and cases referred to in a note to the last case. In Stewart v. Jones Chief Justice Meredith has departed somewhat from the traditions of his side of Osgoode Hall by making the applicant for the receiving order undertake that the fund shall be applied

by the receiver as if it had come to the hands of the sheriff under the Creditors' Relief Act.

Inspector of Legal Offices.

The report of Mr. James Fleming, Inspector of Legal Offices, Ontario, 1899, has been published. It is to be noted that there is an increase in the business of Surrogate Courts, and that Coroners have been added to the officers under Mr. Fleming's inspection.

Recent American Decisions.

The right of the owner of a life interest in lands to maintain an action of partition against the owner of the estate in remainder is denied in Love v. Blauw (Kan.), 48 L. R. A. 257, where it is held that a decree setting over a part of the property to a life tenant in fee simple in a partition case is wholly void.

A contract to draft a bill and do all things needful and proper to secure its passage by the legislature for a compensation contingent upon its passage is held, in Richardson v. Scotts Bluff County (Neb.), 48 L. R. A. 294, to be void on grounds of public policy as a lobbying contract.

The communication of Texas fever by infected cars to cattle transported in them is held, in Illinois Central R. Co. v. Harris (Ill.), 48 L. R. A. 175, to render the railroad company liable for damages.

The right of coloured children to attend any school they or their parents may choose, instead of being restricted to the separate schools established for coloured children, is denied in People ex rel. Cisco v. School Board (N.Y.), 48 L. R. A. 113, where equal accommodations are furnished for coloured children. It is held that the constitutional provision for free schools does not prevent the classification of the children with respect to their attendance on particular schools.

An extraordinary case is that of Allaire v. St. Luke's Hospital (Ill.), 48 L. R. A. 225, in which the right of a person to maintain an action for personal injuries sustained by him before birth is denied.

The destruction of oysters by casting sewage upon them, though from a sewer constructed by a city under legislative authority, is held, in Huffmire v. Brooklyn (N.Y.), 48 L. R. A. 421, to be as clearly a taking of the property of the owner of the oyster bed for which he has a constitutional right to compensation as if there had been a physical removal and conversion of the oysters.

An ante-nuptial contract by which a wife agrees, for a certain sum, to release all interest in her husband's estate in order that it may pass by his will, with a covenant not to interfere therewith, is held, in Hudnall v. Ham. (Ill.), 48 L. R. A. 557, sufficient to preclude her from contesting the right of the beneficiaries under the will on the ground that it was revoked by the marriage, especially when she has accepted the consideration agreed upon after her husband's death.

A voluntary exposure to unnecessary danger within the meaning of an exception in an insurance policy is held, in Fidelity & C. Co. v. Sitting (Ill.), 48 L. R. A. 359, not to be made by an attempt of a travelling salesman to get upon a train in motion, if the danger is not so apparent that any man of ordinary intelligence would know it.

A condition in a legacy that the legatee's right thereto shall depend upon the decision of the executors at the end of a certain time that he is a reformed man is sustained in Re Jones (Mich.), 48 L. R. A. 580, on the ground that it is sufficiently certain and that such decision is a condition precedent to his right to the legacy.

One who bids at public sale, not because of any desire to purchase, but merely to run up the price, either in his own interest or that of another, is held, in McMillan v. Harris (Ga.), 48 L. R. A. 345, not to be a "puffer," if in case his bid is the last and highest he can be compelled to take and pay for the property, although by arrangement with others he may not be compelled to keep and pay for it.

The mere fact that an employee thinks an act is unsafe is held, in McKee v. Tourtellotte (Mass.), 48 L. R. A. 542, insufficient to render him guilty of negligence in performing it, if the employer assures him that there is no danger. With this case is a note on the effect of an assurance of safety given by the master or a co-servant.

The acceptance of a proposition to buy real property, which is definite in nothing except the amount to be paid, is held, in Arkansas Fire Ins. Co. v. Wilson (Ark.), 48 L. R. A. 510, not sufficient to defeat insurance thereon, under a policy providing that it shall be void if the interest of the assured becomes other than that of unconditional and sole ownership.

An indictment found by the grand jury on a holiday is held, in State v. Thomas (Ohio), 48 L. R. A. 459, not to be for that reason invalid.

BOOK REVIEWS.

The Law relating to Executors and Administrators in the Province of Ontario, by R. E. KINGSFORD, M.A., LL.B., of Toronto, Barrister-at-law. Toronto: The Carswell Co., Limited.

This is a very good and useful book, containing a great deal of matter in a comparatively small compass, by dint of rigid condensation. It is not intended to supersede Williams on Executors in this Province, nor does it attempt to cover all the same ground, but it professes. and we think it lives up to its profession, to shew what is the Ontario law relating to executors and administrators. Its further, and more ambitious, purpose is to serve as a draft code—"a contribution towards a codification of the law," the author calls it. With this in view, the whole book is divided into numbered paragraphs, each stating a single proposition, generally with a reference to statute or case law to support it, though the book is by no means overburdened with citations of cases. In the appendix there are statutes, forms, and rules, and also a paper by Mr. Harry Vigeon, F. C. A., on executors' accounts, with a model set attached—a useful addition to a work of this kind, partaking of the practical as well as of the theoretical. There is of course an index, and it seems to be a good one. We have no hesitation in recommending the book.

Attachment of Debts, Receivers by way of Equitable Execution, and Charging Orders on Stock and Shares, with Forms, etc. By MICHAEL CABABÉ, of the Inner Temple, Barrister-at-law. 3rd edition. London: Sweet & Maxwell, Limited.

Mr. Cababé's little books are very well known and very useful. This new edition has added to the former contents a chapter on Charging Orders. It therefore now deals with the three methods of obtaining execution when the property sought to be reached cannot be seized by the sheriff under

writ—execution on debts, execution on equitable interests, and execution on stock and shares. We would like to see a Canadian edition of Cababé on Attachment. Some cases have been decided here upon points which do not seem to have arisen in England, while at the same time nearly all the English cases have been discussed here and are more or less applicable to our practice. A collation of both groups would be useful.

Broom's Legal Maxims—A Selection of Legal Maxims, Classified and Illustrated; by Herbert Broom, LL.D. The 7th edition, by Herbert F. Manisty, LL.B., and Herbert Chitty, M.A., Barristers-at-law. London: Sweet & Maxwell, Limited.

This is a book well known to students of the laws of Great Britain and Greater Britain, and a new edition will, we doubt not, be well received. Dr. Broom died in 1882, having published five editions, the first in 1845. The sixth edition was issued in 1884, and was prepared by Mr. H. F. Manisty and Mr. Charles Cagney. Sixteen years having elapsed, it is not surprising that the book has grown in bulk by the addition of a selected number of the many recent decisions and enactments which bear upon the principles discussed, though the editors have not made many additions to the text. The work is still comprised in one volume. Acknowledgments are made to Lord Lindley for the assistance derived from a copy of the second edition noted up by him and lent to the editors.

Perhaps it would strike a lawyer seeing this book for the first time, if there could be such an one, that its use would be almost altogether confined to those beginning the study of the law and desirous of taking a rapid view of its most striking features from an academic standpoint, but there is good reasons to believe that Broom is popular with working lawyers also. It cannot be said that there is much of practical value in the book which will not be found elsewhere. The division of the maxims into classes—(1) maxims relating to constitutional principles; (2) to property, marriage, and descent; (3) the interpretation of written instruments in gen-

eral; (4) contracts; and (5) evidence—indicates how each may be studied from another standpoint. Nevertheless, a man preparing himself for a particular case will often save a great deal of trouble by consulting Broom, and if he should chance to be unfamiliar with a branch of law which applies to his case, he cannot do better than go to Broom for his principles. This new edition enables him to do so with confidence, for it is carefully edited, and annotated up to the middle of the present year.

The British Command of the Sea and What it Means to Canada, by Captain William Wood, Royal Rifles, Canadian Militia. Toronto: The Hunter-Rose Co. (Ltd.).

This is one of the publications of the Toronto branch of the Navy League in Canada. The branch is distributing ten thousand copies among the people of the Dominion, and is in this and other ways doing excellent work for the Empire. Mr. H. J. Wickham, the honorary secretary, a well-known Toronto barrister, is indefatigable in promoting the objects of the branch, the chief of which is to bring about the establishment by the Dominion of Canada of a naval force to supplement our present militia system.

The Municipal Manual (Part I.), containing the Municipal Act and the amending Acts of 1898, 1899, and 1900, with notes of cases bearing thereon. Eleventh edition, being the Sixth edition of Harrison's Municipal Manual; Revised and Rewritten by C. R. W. Biggar, M.A., Q.C. Toronto: The Carswell Co. (Limited). 1900. Royal 8vo., xliv. and 1128 pp.

The growth of our municipal system and its importance from the standpoint of the practical lawyer could not be better exemplified than by a comparison of the recent work of Mr. Biggar and the first edition of Harrison's Municipal Manual, published in 1858. In that volume only 200 cases were referred to. In Mr. Biggar's edition no fewer than 3,500 are cited, and many of these are, by reason of their applicability to different sections of the Act, referred to in various portions of the work; 2,229 of these decisions are

by Canadian Courts. The work is, like its predecessors, an annotation—not a treatise. Were we not told that it is an edition of Harrison's Municipal Manual, it would be difficult to recognize it as such. Every line has been rewritten. Much citation of American authority which appeared in the earlier editions of that useful work has been discarded, and in its place the authorities which have built up and elucidated our present system have been inserted.

There are many excellent features which are entirely new. Thirty pages are devoted to a history of municipal government in Ontario from 1788 to the present time, and ten excellent pages—893-902—shew the origin and evolution of the "complicated, cumbrous, and contradictory clauses of the Act dignified by the title of the 'Local Improvement System.'"

The political lawyer will find at pages 193-195 a complete summary of the law relating to the counting of ballots, with illustrations of what marks have been held to constitute a cross and *vice versa.*

The forms of debenture by-laws at pp. 395-409 were revised by such well-known counsel, skilled in such matters, as Mr. Alexander Bruce, Q.C., and Mr. Z. A. Lash, Q.C., and are alone worth the price of the work to every lawyer who may be called upon to advise either as to the borrowing or lending upon municipal debentures.

The delay in publishing the work is sufficiently excused by the evidence of industry of the author, which is apparent on every page. He has in a few instances fallen a victim to the wealth of material from which he had to choose, and has consequently included too much.

The notes on "nuisances" discuss chiefly the remedy by injunction and indictment, but the limits and extent of municipal jurisdiction over the same are not so clearly defined as could be desired in a note to a section giving a municipal council power to pass by-laws for preventing and abating public nuisances. Section 325 provides that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for." This section was applied in Waterous Engine Works Co. v. Town of Palmerston, 20

O. R. 411, 19 A. R. 47, 21 S. C. R. 556, but has been overlooked in the notes to that section, although mentioned in other parts of the work.

Excellent notes on the law and practice in the trial of controverted elections are contained at pp. 233-257. The opinion is expressed at p. 325 that a junior Judge is not included within the words "senior or officiating Judge" in s. 219 (1), and reference is made to s. 4 of the County Courts Act. Section 14 of that Act would seem to confer such jurisdiction on the junior Judge.

In the notes upon compensation for lands taken or injuriously affected, the application of the Statutes of Limitation is mentioned at p. 475, but the case of Ross v. Grand Trunk R. W. Co., 10 O. R. 447, which may bear on that question, is not cited.

In many portions of the book the desire of the author to give the fullest information on the subject in hand has led him to give long quotations from judgments of learned Judges. The pith of the judgments can generally be stated much more shortly and with much greater satisfaction to the practitioner without sacrificing the exact language which states the point. There can be no object, moreover, in quoting from a judgment which has been rendered obsolete by an amendment of the Act, as is done on page 236, where somewhat extensive quotations are made from judgments of Hagarty, C.J., and Richards, C.J., showing that as the law formerly stood a person elected by acclamation could not be unseated by summary proceedings under the Act.

In but one or two instances has the author failed to state the effect of the series of decisions upon sections under discussion, but the notes upon Transient Traders, pp. 750-1, seem to offend in this respect.

The author is to be particularly commended for the excellence of his notes on the general powers of municipal corporations, the liabilities of corporations as masters for misfeasance of their servants, the principles acted upon in quashing by-laws, the requisites of debenture by-laws, compensation for lands taken or injuriously affected, and the

law relating to highways and the jurisdiction of municipalities over the same.

The case of Pearson v. County of York, 41 U. C. R. 378, is cited on page 837 with the warning that the case is of questionable authority; McGregor v. Township of Harwich, 29 S. C. R. 443, might have been referred to. The opinion of Strong, C.J., in that case would indicate that a liability of a municipality for misfeasance is not subject to the limitation applicable to cases of non-repair under s. 606.

The present volume is to be followed by Part II., containing the Assessment Act, the Municipal Drainage Act, and other important statutes relating to municipal matters. This apparently was an afterthought of the author, rendered necessary by the increasing size of the present volume. On p. 30 he speaks of "the notes to the Act respecting the establishment of municipal institutions in territorial districts (R. S. O. c. 226, *sic*) which follows the Municipal Act in the present volume;" but a search reveals the fact that this statute will probably be found in the second volume.

The typographical work is excellently done. A few mistakes were inevitable, such as the transposition of part of note (*g*) to note (*h*) on page 111, and the wrong numbering of s. 583 in the side note on 18 pages, 731-748 (noted in the corrigenda).

The work includes the amendments to the Municipal Act passed since the revision of 1897 to date, and many of the sections of the Municipal Amendment Act, 1900, are worked into the text, some 32 pages being reprinted for that purpose. The volume is a necessary part of the machinery for the workshop of every lawyer who has municipal work to do. It is far in advance of anything we have had on the subject.

The comparative table, pp. xxxvii.-xliv., shewing the corresponding or cognate sections in the Municipal Acts of British Columbia, Manitoba, Quebec, and the North-West Territories, will add much to the value of the work in those Provinces.

CORRESPONDENCE.

Which Legislature Should Provide for Summary Trials?

To the Editor of THE CANADIAN LAW TIMES:

Sir,—If Regina v. Levinger, 22 O. R. 690, which—destroying the force of Regina v. Toland, 22 O. R. 505—proclaimed the nomination by the Province of the General Sessions of the Peace as a forum which, in common with the Assizes, might take cognizance of forgery by statute, to involve matter of constitution, and not procedure, and to be, for such reason, intra vires of that authority, be well decided, assigning for trial and determination in a summary way offences of a criminal nature is beyond the competency of the Dominion Parliament. Every Act, then, of theirs, if the exposition there furnished is to guide—revolutionary in its fruits as would be a giving effect to this estimate—which directs a justice of the peace to entertain and dispose of these offences is, until the Ontario Legislature shall choose to ratify its provisions. or until the central body shall itself erect a tribunal for their investigation, to that extent, null. In the one case, as in the other, creating the offence, and affixing its punishment—joined, of course, with governing the course of the trial—must be held to represent the farthest stretch of their empire—the whole area comprised within the pale of their influence. But the judgment, unless the Court, in forming their view, can be supposed to have kept before them (and this is a suggestion which, considering the language of one of the Judges who composed the bench when, its personnel the same, they were, some years before, settling a parallel question in Regina v. Bush, 15 O. R. 398, may fittingly be ventured) the item "the administration of justice" as a vital part of the assignment of powers under paragraph 14 of sec. 92 of the B. N. A. Act—a point to which Lord Selborne, in the Privy Council, where this related controversy finally went (5 App. Cas. 115) calls attention—strikes the writer as coming into palpable conflict with Valin v. Langlois, 3 S. C. R. 1.

Whether reflection upon the gift, in its entirety, swayed the Court in Regina v. Levinger, or not, certain it is, at all events, that Mr. Justice Taschereau, whose line of reasoning his colleagues, however, not taking it up, do not indorse, in Valin v. Langlois—which concerned the referring to a Superior Court of Quebec the hearing of their election protests—endeavours to show, as bearing on the problem in hand, that the Dominion Parliament have, by virtue of their admitted control over "the criminal law," an unmistakable right to impose on existing Provincial Courts the trial of any offence they may resolve to create. Moreover, the then Chief Justice (Allen) of the Supreme Court of New Brunswick, delivering the consentient utterance of the Court in Ex p. Porter, 28 N. B. Reps. 587—by which they affirm the principle of holdings of their own in Ex p. Perkins, 24 N. B. Reps. 66, and Ex p. Williamson, 24 N. B. Reps. 64—while seeming to misconceive the declaration of those Judges not committing themselves to it, unreservedly embraces the opinion avowed by Mr. Justice Taschereau in Valin v. Langlois.

Mr. Justice Rose, in the case of Regina v. Maracle, recently allowed a certiorari to go for the purpose of freely debating the matter.

J. B. M.

Toronto.

THE

CANADIAN LAW TIMES.

NOVEMBER, 1900.

THE LAW OF NAMES.

THERE is an old and prevalent idea in lay minds that a man can validly change his name only by Act of Parliament. Indeed, even among lawyers, if honest confession is to be made, there generally has been a somewhat hazy understanding of the rights and privileges attached to a name, and a not too profound sense of the importance of accuracy in description and repetition. Look at the mortifying muddle, created by want of care in a solicitor's office, which is made evident in Burton v. Dougall (*a*), both from inaccuracy as to fact and illegibility as to writing a name. One partner wrote his mortgagee client's name "Clara," instead of "Mary Jane," and wrote "Burton" so that the other partner mistook it for "Benton," and "Clara Benton," as mortgagee, was unable to make title when she came to sell under power of sale in her mortgage.

The learned Judge who heard the appeal gave this as the test: "If the name by which the grantee is described is either his real name or, though not his real name, that by which he is known, and probably even a name assumed for the purpose of the transaction to which the deed relates, the deed is valid, but if it be intended to describe the grantee by his proper name and a wrong name is inserted by mistake, I think the deed is inoperative . . . I am unable to see any practical difference between this case and one in which a blank has been left where the name of the grantee should appear."

(*a*) (1899), 30 O. R. 543.

If the phraseology in this quotation is adopted, a definition must be given of what is a "real name." A personal name must consist of a surname and a christian name. The former is by custom that of the person's parents, and the latter, that given him at baptism and confirmation, or, among those who have not partaken in those rites, the name bestowed in early youth.

There is American authority for saying, however, that "no person is bound to accept his patronymic as a surname, nor his christian name as his given name, although the custom to do so is almost universal among English speaking people who have adopted the common law"(*b*); and Abbott, C.J., said: "A name assumed by the voluntary act of a young man at his outset in life, adopted by all who know him, and by which he is constantly called, becomes, for all the purposes which come to my mind, as much and effectually his name, as if he had obtained an Act of Parliament to confer it upon him" (*c*).

In referring to the probably popular impression that governmental approval is requisite to a change of name, Tindal, C.J., said: "There is no necessity for an application for a royal sign manual to change the name. It is a mode which persons often have recourse to, because it gives greater sanction to it, and makes it more notorious, but a man may if he pleases, and it is not for any fraudulent purpose, take a name and work his way in the world with his new name as well as he can" (*d*).

And, although a man be christened by one name, there is no reason why he should not discard it, as indeed is frequently done, sometimes from a personal dislike to it, sometimes to reduce the chance of mistake when there are several of the like name in the same community, and often from motives of affection, or expectancy of favour or bequest, the name of a relative is substituted for that given in extreme youth.

(*b*) Schofield v. Jennings (1879), 68 Ind. 238.

(*c*) Doe v. Yates (1822), 5 B. & Ald. 544.

(*d*) Davis v. Lowndes (1835), 1 Bing. N. C. 597. And see the recent cases in Scotland, Re Johnson, 2 Ct. of Sess. Cas., 5th series, 75; Re Robertson, *ib.* 127; referred to *ante* 271.

"If a man be baptized by the name of Thomas, and afterwards at his confirmation by the bishop he is named John, he may purchase by the name of his confirmation. And this doth agree with our ancient books; where it is holden that a man may have divers names at divers times, but not divers christian names. And the Court said that it may be that a woman was baptized by the name Anabel and forty years after she was confirmed by the name of Douce, and then her name was changed and after she was to be named Douce and that all purchases, etc., made by her by the name of baptism before her confirmation remain good" (*e*).

With regard to Burton v. Dougall (*f*), before cited, it is to be remembered that a will is not treated with as much strictness as a grant. Not perfect accuracy but only legal certainty is then required. Nihil facit error nominis cum de corpore constat.

In Re Whitty (*g*) the testator's bequest was to "my sister Anastasia Cummings." He had no sister Anastasia, and the only sister he had surnamed Cummings was Maria. It was promptly decided that Maria took. But if the ambiguity is not removed by the context, and by parol evidence of the surrounding circumstances, the gift fails for uncertainty; for direct evidence of the testator's intention is inadmissible (*h*). But where the gift was to Robert Careless my nephew," and there was two of that name, Sir W. Grant held that, as the ambiguity was created by facts dehors the will, parol evidence was admissible to shew that one Robert the testator knew intimately, and that the other was almost unknown to him.

Disputes as to names are more abundant in the old country than in Canada, by reason of the fact that the aristocracy there is older and of greater wealth and leisure than our best people. More importance is attached in England to ancient family names and titles, and the excusable vanity of desiring to perpetuate a name is more prevalent. But it

(*e*) Coke on Litt., 3 a.
(*f*) (1899), 30 O. R. 543.
(*g*) (1899), 30 O. R. 300.
(*h*) Jarman, 5th ed., p. 353.

is to be noted that the Courts will not restrain the use of a family name by a person not of the family. In this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. Use of a trade name may be restrained by injunction, but the mere assumption of a name which is the patronymic of a family by a stranger who has never been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our law affords no redress (*i*).

The writer is aware of but one case in Canada where a person sought the notoriety and sanction given by a special Act of Parliament to a change of name. And Lord Eldon said that by taking a new name by Act of Parliament a person does not lose his original name. The effect of the Crown's license is only to use a name, not imposing it (*j*).

Judge, Bishop, Baronet, Knight, are all names of dignity. Writs brought for or against them ought to name them so. A grant made to them ought to be by their names of dignity, for the dignity is parcel of their names (*k*).

In this connection the recent case of Cowley v. Cowley (*l*) is of interest, reversing as it does the judgment of Gorell Barnes, J. (*m*), to which there seemed at the time to be no answer. The Countess Cowley secured a divorce from the Earl, and then married Mr. Myddleton Biddulph. Notwithstanding her second marriage, she continued to use her former name and title, instead of that of Lady Violet Biddulph, alleging that she did so because of her desire to bear the same name as that borne or to be borne by her son, the child of her first marriage. Gorell Barnes, J., held that a title was an incorporeal hereditament, to which its holder had an exclusive use, and that, having divorced her first husband, the lady had no right to use his title, on the principle that what a woman gains by marriage she loses by marriage. The Court of Appeal (Lord Alverstone, M.R.,

(*i*) Du Boulay v. Du Boulay (1869), L. R. 2 P. C. 430.
(*j*) Leigh v. Leigh (1808), 15 Ves. 100.
(*k*) Vin. Abr., sub tit. "Noemes."
(*l*) (1900), 16 Times L. R. 563.
(*m*) [1900] P. 118.

Rigby and Collins, L.JJ.) held that the fact of her marrying again was unimportant; that a peer's name was not better than a commoner's name; he could not have succeeded if the old action for jactitation were yet in use; and his suit must fail. As leave was given to appeal, it will be interesting to observe what view will be taken of the matter by Judges who are themselves all of the House of Peers. In the meantime the apparently meek Mr. Biddulph will have no wife bearing his name, and registration at hotels where the circumstances are unknown may give reasonable excuse to proprietors for desiring explanation.

The assumption of a name as a condition precedent to inheritance has often given occasion for judicial decision. The name must be unequivocally and not evasively assumed. When Gregory Gregory by will limited certain properties to the use of the eldest son of Sir G. E. Wilby, with the proviso that upon all occasions he should take the name of Gregory, and the son, Sir William Wilby, by royal license assumed the name Gregory-Wilby, Jessel, M.R., said he was clearly of opinion that such was not a sufficient compliance with the conditions of the will(*n*). But a gift to descendants who should bear a certain name was held to include a descendant who assumed the name, and was not to be confined to persons who would have a natural right to use the patronymic (*o*).

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Toronto, Sept. 1900.

(*n*) D'Eyncourt v. Gregory (1875), 1 Ch. D. 441.
(*o*) Re Roberts (1881), 19 Ch. D. 520.

AMENDMENTS TO THE CRIMINAL CODE.

(Concluded.)

In the first paper we have dealt with the amendments relating to the specific offences created by the Code. We now come to the second branch of the subject, namely, procedure.

Section 533 deals with the power to make rules. By 1900, c. 46, a new sub-section, "3," is added to the section. It gives the Supreme Court of Judicature power to make rules for Ontario, a majority of the Judges being sufficient.

Section 540 deals with the subjects which the General Sessions may not try. By 1894, c. 57, escapes and rescues (Part XI.), which had been removed from their jurisdiction, were restored. By the amendment of 1900, indictments for bribery or undue influence, personation or other corrupt practice under the Dominion Elections Act, may not be tried before the Sessions.

Section 546 is extended and made applicable to offences under sections 256 and 257, by 1893, c. 32.

Section 550 provided for the separate trials without publicity of minors under sixteen. By 1894, c. 58, such trials which theretofore were to be private "so far as expedient and practicable," were made compulsory. A new section, 500 A, is now added. Under the section of 1900, in certain classes of cases coming under part XIII., offences against morality, and part XX., assaults, part XXI. and part XXII., abduction, the Court or Judge may order the public to be excluded. The section also provides as follows, "such order may be made in any other case also in which the court or judge or justice may be of opinion that the same will be in the interests of public morals."

In trials for conspiracies or attempts to commit or being accessory after the fact to any of the above offences, similar powers are given.

The section is also declared not to limit any power of a Judge to exclude the general public when deemed necessary or expedient.

Section 552 mentions the cases when arrests can be made without a warrant. By 1895, c. 40, offences under certain enumerated sections of Part XXVI., thefts by particular persons in respect of particular things in particular places, are added.

By 1895, c. 40, the powers of a peace officer to arrest without warrant were extended to all the subjects enumerated in s. 552. By the same Act, a peace officer is given power to arrest without warrant any one whom he finds committing any "criminal" offence; and any person may arrest without warrant any person whom he finds committing any "criminal" offence by night.

Further, by the same Act, the owner of any property on or in respect of which any person is found committing "any offence," or the agent of such owner, may arrest the culprit without warrant.

These two last clauses as they now stand are very unsatisfactory; as they originally stood, they were "against this Act," which is intelligible; now they are unlimited in scope, and are dangerous.

Section 553 relates to the jurisdiction of justices. Paragraph (*a*) applies to offences committed in or upon any water, tidal or other, between two or more magisterial jurisdictions. In such case the offence is considered as having been committed in either jurisdiction. By the amendment of 1900 the words "or upon any bridge" are inserted after the words "water, tidal or other."

Section 575, relating to searches in gaming houses, is by 1894, c. 57, and 1895, c. 40, extended in various minor ways. In its present shape it reminds one of the repetitions in Daniel "what time ye hear the sound of cornet, sackbut, harp, flute, dulcimer," etc.,—it is a mass of verbiage. The only really substantial alteration made is its extension to lotteries or lottery schemes. When the Code is revised it is to be hoped these vain repetitions will be avoided.

Section 589 relates to the proceedings on breach of recognizance on remand. Under the section before amendment the recognizance was transmitted to the clerk of the Court or other proper officer. By the amendment of 1900, c. 46, the recognizance is to be transmitted in Ontario to the Clerk of the Peace. The Court of General Sessions is directed to estreat at its next sitting all forfeited recognizances. In British Columbia the proper officer is the clerk of the County Court, and in the other provinces the same as heretofore.

Section 601 provides for taking of bail. Under the section as it stands without amendment the recognizance is in the form BB. The amendment of 1900 provides as follows:—

3. Where the offence is triable by the General Sessions, and the justice is of opinion that it may be better tried there, the condition of the recognizance may be for the appearance of the accused there, although the sittings of a Superior Court intervenes.

Section 613 states that certain objections shall not vitiate counts. 1893, c. 32, adds the following: "Or in cases where the consent of any person, official or authority is required before a prosecution can be instituted, that it does not state that such consent has been obtained."

A slip in section 634 is corrected by 1893, c. 32. The word "bears" is substituted for "appears"—a printer's error.

Section 641. In this section a new sub-section is added by 1900, c. 46, as follows, "The counsel acting on behalf of the Crown at any court of criminal jurisdiction may prefer against any person who has been committed for trial at such court a bill of indictment for the charge on which the accused has been so committed or for any charge founded on the facts or evidence disclosed in the depositions taken before the justice."

Section 651. An amendment is made by 1894, c. 57, relating solely to Quebec—to the effect that if there is no term of the Queen's Bench, the prisoner may be tried in some other district.

By s. 662, as amended by 1894, c. 57, where in any province the panel of grand jurors is not more than thirteen, seven may find a true bill. This amendment was brought into effect by proclamation on the 1st January, 1895, duly published in the Canada *Gazette*.

Section 673, relating to the course of a criminal trial, is amended by 1895, c. 40. The section is divided into subdivisions. A new clause is inserted as follows: "2. The court may adjourn the trial from day to day, and if in its opinion the ends of justice so require, to any other day in the same sittings." Sub-section 3 then provides that upon any adjournment "under this section, or under any other section of this Act," the court may order the jury to be kept together—"under this Act" would have been enough.

Section 678 deals with the subject of attendance of witnesses. A new section, 678 A, is added by 1900, c. 46. This new section gives the Court or Judge power to issue a warrant to apprehend a witness. If the Court or Judge is satisfied by evidence that any person within a province likely to give material evidence, either for the prosecution or for the accused, will not attend to give evidence without being compelled so to do, a warrant for the apprehension of such witness may be issued, and he may be detained or be released on recognizance to give evidence.

Section 679 deals with the subject of a witness being out of the jurisdiction of the Court, but in another province. A new section is added, by 1900, c. 46, declaring that the Courts of the various provinces shall be auxiliary to one another, and proceedings for contempt may be enforced by any Court in the province in which the witness resides.

Section 680 deals with the subject of the procuring of the attendance of a prisoner as a witness. A new section is by 1900, c. 46, substituted for the present section. The Chairman of General Sessions is added to the persons who may require the attendance of a prisoner for the purpose of giving evidence.

Further, the order may be either that the gaoler deliver the prisoner to some person named in the order, or that

the gaoler himself, or other person having the custody of the prisoner, convey him to the court.

Section 683 refers to evidence taken out of Canada under commission. By the amending Act of 1895 it was provided that the depositions taken under the commission might be used as evidence as well before the grand jury as at the trial. Without taking any notice of this amendment, the Act of 1900 again adds s.-s. 3 to s. 683, and repeats the provision, but with the limitation that such depositions by the direction of the presiding judge may be read in evidence before the grand jury.

Section 684 (*c*) was amended by 1893, c. 32. "Part XII." was corrected into Part XIII.—that is, it was made clear that to convict under ss. 181 to 190 inclusive (criminal cohabitation), corroborative evidence was required.

Section 687 deals with the subject of the use of depositions taken at a preliminary investigation. There are one or two serious changes made by the amending Act of 1900, c. 46. Under the present clause if the deposition was taken in the presence of the accused and he, his counsel or solicitor had a full opportunity for cross-examination, then the deposition could be read. In the amending Act the word "he" is dropped, and now, in order that such a deposition may be read at the trial, the accused must have been represented by counsel or a solicitor.

As regards cases where the accused has not had a counsel or solicitor, the amending clause is silent as to whether the deposition can or cannot be read.

Under the present section strict evidence is required of the death, illness, or absence from Canada of the former deponent. Under the new section facts must be proved only from which such death, illness, or absence may be reasonably inferred.

Further, "deposition" is extended to include the evidence of a witness given at any former trial upon the same charge.

A new section, 701 A, is introduced by 1900, c. 46, providing for the age of boy, girl, child or young person for the purposes of ss. 181, 186, 210, 211, 216, 261, 269, 270, 283, 284,

and 934 A. It is provided that entries or records of incorporated Children's Aid Societies shall be prima facie evidence. In the absence of evidence, the age may be inferred from the appearance of the person.

Sections 702 and 703, relating to evidence of the place being a common gaming-house, are by 1900, c. 46, extended to s. 199, which provides for the punishment of people playing or looking on in a gaming-house, as well as s. 198, which provides the punishment for keeping a gaming-house.

Section 705 was repealed by 1893, c. 32, and an important change was made. By the amendment it is a defence to shew that the publication was in good faith and "without ill-will to the person defamed" (instead of "without malice"). Also, the section is not confined to prosecutions under s. 289, but is made general.

A new section, 707 A, is added by 1900, c. 46, providing for prima facie evidence in the case of theft of branded cattle under s. 331 A, referred to in the last paper.

Section 729, relating to taking a verdict on Sunday, is amended (1900, c. 46) by extending the section to any other holiday.

Section 735, amended by 1893, c. 32. The words "writ of error or" are struck out to meet the new procedure for appeal, as provided in s. 743.

Section 744 relates to appeals when the court refuses to reserve a question. Under the present section a party applying has to obtain the leave in writing of the Attorney-General. Under the amendment of 1900 such leave is no longer required.

Section 760 relates solely to Nova Scotia. Under the amendment of 1900, the words "indictments shall not be made out, except in Halifax, until the grand jury so directs," are omitted.

In s. 763 the expression "county attorney" is to include in Ontario the County Crown Attorney.

In the same section, by 1895, c. 40, special mention of the Judges of Algoma, Thunder Bay, Muskoka and Parry Sound, was struck out as unnecessary.

Section 765 provides for the speedy trial of persons with their own consent out of Sessions, or out of the regular term. A new sub-section is added by 1900, c. 46, to this section, making it apply to a person who has been bound over by a justice under s. 601, and who has been unable to find bail, or being surrendered by his sureties is in custody.

Section 766 relates to the duty of the sheriff after the accused is committed. That officer must notify the Judge of the prisoner's election. The amendment of 1900 provides that where the Judge does not reside in the county where the prisoner is committed, the notice may be given to the prosecuting officer, who shall cause the prisoner to be brought before him.

Section 767 relates to the arraignment of the accused before the Judge. At present it is the Judge alone upon whom is thrown the duty of informing the prisoner as to his option of being tried with or without a jury. By the amendment of 1900, the prosecuting officer has now the same duty thrown upon him as well as the Judge, and the section has been recast to meet this addition. A further sub-section gives any prisoner who has elected to be tried by jury the right to re-elect to be tried by a Judge, but such re-election may be refused.

Section 782 defines the term "magistrate" for the purposes of the summary trial of indictable offences. By 1895, c. 40, it is extended to two justices of the peace sitting together, when defendant is charged under paragraphs (*c*) and (*f*) of s. 783, subject to appeal as under Part LVIII. and to s. 879 and following sections.

Section 784. Amendment of 1895 is repealed by 1900, c. 46, and new clause substituted. In certain cases a magistrate has absolute jurisdiction. In Prince Edward Island, British Columbia, North-West Territories, and Keewatin, the jurisdiction of a magistrate is made absolute under Part LV., "except in cases coming within the provisions of section 785." Cases under ss. 789 and 790, where the person charged is not a person who under s. 784, s.-s. 2, can be tried summarily without his consent, are also excepted.

Section 785 relates to summary trials in certain cases. The section as it stands relates to the province of Ontario. By the amendment of 1900, c. 46, the section is extended to police and stipendiary magistrates of cities and towns in every other part of Canada, and to recorders where they exercise judicial functions. Sections 787 and 788 are declared not to extend or apply to cases tried under this section; but where the magistrate has jurisdiction by virtue of this section only, no person shall be summarily tried thereunder without his own consent.

Section 789 relates to proceedings for offences in respect of property over $10. The alterations by the amendment of 1900, c. 46, appear to be unimportant. In every case, except one, the magistrate must put to the accused the question whether he wishes to be tried summarily or to go to a jury; the exception is the case of a sea-faring person, who, under s. 784 (2), can be tried summarily without his consent.

Section 790 relates to the punishment on a plea of guilty. If there is a plea of guilty, the amendment to this section leaves the law as it was. If there is a plea of not guilty, the amended section says that the accused shall be remanded to gaol to await his trial. This amendment cures the evident contradiction between s. 790 and s. 786 as they stand.

Section 801 relates to the duty of a magistrate to transmit proceedings after adjudication. Under the amendment of 1900, c. 46, these returns are to be transmitted to the clerk of the peace or other proper officer. The section is not to apply to magistrates in cities and towns.

Section 806 relates to the application to fines. It was amended by c. 57, 1894. The original section and amendment are both repealed by 1900, c. 46.

Section 827, relating to the same subject, is also repealed by 1900, c. 46.

Section 832, relating to costs, is amended by 1900, c. 46. In addition to ordering the payment of costs on conviction of treason or any indictable offence, "the Court or Judge may include in the amount to be paid such moderate allowance for loss of time as the Court or Judge, by affidavits or other inquiry or examination, ascertain to be reasonable." In other respects

the section is unchanged. The cause as amended is vague. Whose loss of time?

Section 838 (4) is amended by 1893, c. 32. A reference to sections 320 and 363 is substituted for 318 and 361.

Section 846 provides that certain objections shall not vitiate proceedings. The section is left substantially as it stands, but the following sub-section is added: "The description of any offence in the words of the Act, or any order, by-law, regulation or other document creating the offence, or any similar words, shall be sufficient in law."

Section 864 relates to the jurisdiction of magistrates to try assaults. Under the present section if the person aggrieved or the person accused objects to the magistrate, he cannot try the offence. By the amendment of 1900, c. 46, this is abolished, and objection cannot be taken to the jurisdiction.

Section 872, relating to convictions, is amended by 1900, c. 46, by adding a new paragraph as follows:

"(*c*) Whenever under such Act or law imprisonment with hard labour may be ordered or adjudged in the first instance, as part of the punishment for the offence of the defendant, the imprisonment in default of distress or of payment may be with hard labour."

The same section is also amended by 1894, c. 57, by striking out a reference to the common gaol of the division for which the justice is acting. The proper place of imprisonment must be inserted.

Section 878, relating to recognizances, is amended by 1895, c. 40, by striking out a mention of Nipissing, and inserting a paragraph relating to British Columbia.

Section 884 is amended by 1894, c. 57, by ordering the Court to receive a notice of appeal whether such notice has been properly given or not.

Section 909 gives power to certain officers to enforce execution of process. By 1893, c. 32, a recorder is added to the list.

Section 916, relating to the entry of fines, etc., is amended by 1900, c. 46, by substituting in Ontario the High Court of Justice for a division of the High Court.

Section 927 relates to the appropriation of fines. Under the section as it stands fines were declared to belong to the Crown for the public uses of Canada. Under the amendment of 1900, c. 46, they will now go to the province, to be paid over to the local authority, if any, bearing expenses of administering the law. Fines imposed for breaches of the revenue loss of Canada are excepted, as are also fines in proceedings where the Dominion bears the cost of prosecution.

Section 943 gives power to deputies to act. Under the Act before amendment it covered only the two preceding sections. Under the amendment of 1900, c. 46, it covers three preceding sections; therefore, hereafter, no political gentleman who is appointed sheriff need be present at an execution. He can send his deputy to represent him. Heretofore the sheriff himself has always been obliged to preside at these occasions. Whether the public will not also demand to be hanged by deputy is a serious question. It seems fair.

Section 951 provided that in cases of conviction for indictable offences for which no punishment was provided, the term should be seven years. By 1893, c. 32, the term was shortened to five years.

Section 955 relates to the subject of imprisonment in the penitentiary. Sub-section 3 provides that if anyone is sentenced to imprisonment in a penitentiary, and at the same sittings he is sentenced for one or more other offences to terms of imprisonment less than two years each, he may be sentenced for these shorter terms to imprisoment in the same penitentiary, these sentences taking effect from the termination of his other sentence. The explanation of this provision is of course that as no person can be sentenced to a penitentiary for a less term than two years, if this clause did not exist, the prisoner at the expiration of his sentence in the penitentiary would have to finish out his term in another prison. By the amendment of 1900, c. 46, an addition is made as follows,—provided further that where any one is sentenced for any offence who is, at the date of such sentence, serving a term of imprisonment in the penitentiary for another offence, he may be sentenced for

a term shorter than two years to imprisonment in the same penitentiary, such sentence to take effect from the termination of his existing sentence or sentences.

Section 957 relates to the punishment of whipping. The amendment of 1900, c. 46, provides for a medical officer to be named if there is no gaol surgeon. The instrument hereafter "shall be a cat of nine tails, unless some other instrument is specified in the sentence." In other respects the law is unaltered.

Section 958, relating to recognizances to keep the peace, was amended by 1893, c. 32, and re-amended by 1900, c. 46. It gives a Court power in the case of a person convicted of an indictable offence punishable with imprisonment for five years to fine in addition to, but not in lieu of, imprisonment. The sentence may add that, in case of non-payment of the fine, further imprisonment may be awarded for a further period not exceeding five years. A Draconian clause.

Section 971 relates to the conditional release of first offenders in cases punishable with not more than two years imprisonment. Under the law as it stands it provides that regard being had (among other circumstances) to the youth of the offender, he may be bound over; by the amendment of 1900, c. 46, the word youth is changed to the word age, thereby extending the power to persons of any time of life. The section further provides that, if the offence is punishable with more than two years' imprisonment, the concurrence of the counsel acting for the Crown must be obtained. A curious and unsatisfactory limitation of the discretionary powers of the Court.

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EDITORIAL REVIEW.

County Court Clerks.

We regret to have to record the death of Mr. A. M. Ross, who was at one time a member of the Executive Council of Ontario, and at the time of his death Clerk of the County Court of York. Mr. Ross was an amiable and estimable man as well as an able one.

We cannot forbear expressing the hope that his successor as County Court Clerk will be a barrister. While it may be true that the public have not been greatly wronged or even inconvenienced by want of legal knowledge in the occupants of various offices connected with the law Courts of Ontario, yet it is not a seemly thing, nor a right thing, that the clerk of a Court should have to "hire a lawyer" to do his work. The clerk of a County Court ought to be just as good a lawyer as the Registrar of the High Court. His duties are in fact more varied. How is a man without a regular legal training to settle a judgment or tax a bill of costs? Only by the forbearance of the members of the legal profession can such things be done by deputy. Ought a layman, or an incompetent professional man, to presume upon that forbearance? What sort of a position does he put himself in if he does so?

We entertain the idea that appointments of this kind should go to professional men. There are many competent lawyers, who, through no fault of their own, as they advance in life, find that what business they have is leaving them. We could name many such in the city of Toronto and elsewhere. Some of them are even conspicuous for integrity and ability. We should like to see the appointment made from this class.

Defamation at Parliamentary Elections.

By s. 1 of the Corrupt and Illegal Practices Prevention Act, 1895 (Imp.), it is provided, that any person who, before or during any Parliamentary election, shall, for the

purpose of affecting the return of any candidate, make or publish any *false statement of fact* in relation to the personal character or conduct of such candidate shall be guilty of an illegal practice. And by s. 3, any person making or publishing such a statement may be restrained from any repetition thereof. The recent general election has provided at least one opportunity for elucidating the statute. Bayley v. Edmunds, 11 Times L. R., and Borough of Sunderland, 4 O'M. & H. 53, were the only previous decisions. The recent case is Ellis v. National Union of Conservative and Constitutional Associations, 109 L. T. Jour. 493, in which Mr. John E. Ellis, Radical candidate for the Rushcliffe division of Nottinghamshire, was the plaintiff, complaining of a poster said to have been issued by the defendants, from which he took the meaning that he was alluded to as a "traitor" and as being in correspondence with the enemy. A writ of summons was issued on the 28th September, and an application for an injunction heard and refused on the 2nd October. Mr. Ellis, it was said, wrote for information to the Boers, and a part of his letter was quoted in the poster. As a matter of fact it was not written to any Boer, but to a British subject in Cape Colony. Mr. Justice Buckley said that he was asked to infer that the poster stated as a fact, and falsely, that Mr. Ellis was in correspondence with the enemy. The poster itself did not say that he was in correspondence with the enemy, and the learned Judge did not think that such was its obvious meaning. The words "Radical traitors" did not contain a statement of fact, but a statement of opinion, and the statute meant to leave untouched the right to state an opinion. This decision, while it appears to properly interpret the statute, which makes it very clear that the statement must be one of fact, suggests that it may be difficult to find any language which can be held to come within the enactment.

Identifying Advocate with Client.

"The position of an advocate in British Courts of law is regarded as strictly impersonal. He is in no sense, however indirect, to be associated with his client. Except under

circumstances which rarely occur even once in extended careers, the advocate is under an implied obligation to undertake any case in which his assistance is required, and it is not optional with him to appear or not in any case as he thinks fit. A resolution actually passed at a meeting at Carnarvon (at which Mr. Lloyd George, M.P., was in the chair), calling upon temperance men not to support "any candidate who acts professionally as counsel for the liquor trade at licensing sessions" is a wanton attack not only on the independence of the Bar, but on the liberty of the subject. It is an effort to identify the professional advocate with the merits or demerits of the cause in which he appears, and to alter in its very essence the position and dignity of the members of the Bar. They will not be slow in resenting any attempts, no matter whence coming, to control their freedom of action in the exercise of a profession in which strong expressions of personal opinion by an advocate are uniformly condemned. In order that those whose business it is to decide on the merits of a case should discharge this function, it is necessary that the arguments on both sides should be laid before them in the strongest form. The clear interest of society requires this, and society in its own interest will not tolerate interference with the standard of professional honour and etiquette formed for the purpose of regulating the conduct of the advocate." This is from the English Law Times of the 22nd September, and we think every lawyer will agree with what is said, at least as regards the matter immediately under comment. If we are to be identified with our clients in one class of cases, why not in all? Is, for instance, a gentleman on the Liberal side of politics who holds a brief in a Parliamentary election case against a Liberal member, and does his best to unseat him, as frequently happens, to be ostracized by his own party for doing his sworn duty as an advocate? The perplexing question discussed by Mr. Louis Sandheim in the Albany Law Journal (13th October, 1900), whether a lawyer should undertake the defence of a person whom he knows to be guilty of the crime with which he is charged, may perhaps be answered with more confidence, when the other question involved therein, whether an advocate is bound to

undertake any case in which his assistance is required, is viewed in the light of the Carnarvon resolution.

The Court of Appeal for Ontario.

This Court on the 23rd October last concluded a remarkably protracted session. It sat on thirty days, during seven weeks. Forty-four cases were heard, and in fourteen of these judgment was given either at the end of the argument or later during the sittings. Besides these, six cases were settled and struck out of the list. Thus, the list of sixty-nine cases which the Court began to hear on the 11th September has been reduced to nineteen—and these, too, might have been heard if the parties had been ready. The present state of the docket is certainly a matter for congratulation.

Judicial Promotions in England.

Lord Alverstone (Sir Richard Webster) has been promoted from the judicial office of Master of the Rolls to that of Lord Chief Justice of England, vacated by the death of Lord Russell of Killowen. Lord Justice A. L. Smith becomes Master of the Rolls; and one of the puisne Justices of the High Court probably goes up to the Court of Appeal, though, at the time of writing, the cable has not informed us whether this is the case, or the name of the new Lord Justice. There has been, however, a mysterious announcement that Mr. Arthur Russell, son of the late Lord Chief Justice, has been made a Judge of the "Circuit Court." It is obvious that we Canadians still get our British news from a tainted source.

The Moral Force of Judicial Decisions.

Ruskin has eulogized the English Judges as "the highest types of intellectual and moral power that Christendom possesses." The Law Times (22nd September, 1900), in concluding an interesting summary of the noteworthy decisions of the judicial year, says:—"Imperfections exist in case law, as in everything else depending on human endeavour, but the clear-cut language of a considered judgment, terse, clear, and decisive, compares very favourably with such legislative efforts as the Workmen's Compensation

Act, 1897, and with some of the statutes for the present year of grace. A perusal of the cases to which we have drawn our readers' attention renders it impossible to withhold a humble tribute of admiration for the intellectual forces there displayed—forces which must necessarily appeal with special power to lawyers who know the complexities of the subjects through which a plain path has been driven. However great this mental grasp, the public would not respect decisions were it not for the moral influence they possess. Both litigants and their advisers are conscious that our case law, unlike our legislation, is unaffected either by fear or favour."

The Day of Atonement.

The 3rd day of October being the great Day of Atonement, the Vacation Judge in England changed the day for holding the weekly Vacation Court, in order that certain Jewish members of the Bar and solicitors might be able to attend. A person reading the English law reports cannot fail to be struck with the frequent occurrence of Jewish names; and in England a majority of the race, we believe, adhere to the faith of their forefathers.

Circulating Libraries and Defamation.

In Vizetelly v. Mudie's Select Library Limited, [1900] 2 Q. B. 170, the Court of Appeal held that well-known institution to blame for circulating a book which, without their knowledge, contained a libel on the plaintiff. The defendants altogether failed to prove that everything possible had been done to detect defamatory passages in works circulated through their agency. It is not unnatural that the proprietors of a circulating library should take chances in such matters, relying upon the care usually exercised by the publisher.

A Reporting Reform.

It is interesting to note that by the efforts of the American Bar Association a change has been very generally made throughout the United States, by rule of Court in some States and by statute in others, by which cases on appeal

retain the title of the case below without reversing the order of names. The advantages accruing from this change have frequently been pointed out. We regret that the Supreme Court of Canada has not seen fit to make a rule on the subject. The number of cases being comparatively small, the confusion arising from the antiquated practice of making a new style of cause with the appellant's name first, is not so serious as in the United States, but it is a continual source of irritation. Of course, the chief trouble arises in connection with the reports of cases. It would not, we suppose, be an improper thing for the Supreme Court reporters to use the style of cause or matter found in the report of the case in the Court below, although the names in the official cause list were different.

Another Bar Story.

A story of the well-known class in which the witness confounds the cross-examining counsel, comes from Moosomin, N.W.T. The meaning of the phrase "in good order," as used in a contract for the sale of cattle, was in question, and counsel for the defendants sought to elicit from the plaintiff his understanding of the term. "If I were selling you cattle," asked the advocate, "and stated they were 'in good order,' what would you understand by that?" After a moment's hesitation, the witness answered, "I would understand that as a matter of fact they were in poor order!"

Recent American Decisions.

The right of a stockholder to inspect books of the corporation is held, in Cincinnati Volksblatt Co. v. Hoffmeister (Ohio), 48 L. R. A. 732, not to depend upon the motive or purpose of the stockholder.

The employment of a pastor whose teachings are inconsistent with those of the sect to which the church belongs is held, in Franke v. Mann (Wis.), 48 L. R. A. 856, to be beyond the lawful power of a majority of the members of a church corporation belonging to a particular sect.

The right of passengers to carry with them small packages of merchandise is held, in Runyan v. Central R. Co.

(N. J.), 48 L. R. A. 744, to be one that is not given by the common law contract of carriage and for which usage must not only be clear and explicit, but also something more than mere accommodation acquiesced in for a time by the carrier.

The remarriage of a divorced woman to one whose ability to support her is unquestionable, is held, in Wetmore v. Wetmore (N. Y.), 48 L. R. A. 666, to preclude the further application to her benefit as alimony of the income of property held in trust for the support of her former husband.

A contract by which a husband agrees to pay money to his wife in discharge of his obligation to support her is held, in Henderson v. Henderson (Or.), 48 L. R. A. 766, not to be against public policy, when it is made, not for the purpose of a voluntary separation, but after a separation has actully occurred on account of the misconduct of one of the parties which justified it.

A charge to the jury that a master should instruct his employee as to the nature, force, and probable effect of the explosion of a pot of molten metal in case it comes in contact with water, and that it is not sufficient merely to instruct that an explosion is likely to follow such contact, is upheld in Ribich v. Lake Superior Smelting Co. (Mich.), 48 L. R. A. 649.

The servant of a truckman who is sent by his master, who pays him, with a horse to a warehouse, to use the horse in operating tackle for hoisting goods, is held, in Murray v. Dwight (N. Y.), 48 L. R. A. 673, not to be a fellow servant of the warehouseman's servants, by whose negligence he is injured when putting the blocks and tackle in place, although he works under the direction of the warehouseman's foreman.

Whether or not an employee acts properly in obeying an order of a foreman to take bottles to an upper floor by the use of an elevator is held, in Dallemand v. Saalfeldt (Ill.), 48 L. R. A. 753, to be a question for the jury. A note to this case presents the authorities on a servant's right of action for injuries received in obeying a direct command.

A brakeman who jumps from the caboose of a moving train on which he is empoyed, for the purpose of looking for his clothing, which he had left in the caboose at the end of a former trip, and who jumps off when through with his search, is held in Olson v. Minneapolis & St. L. R. Co. (Minn.), 48 L. R. A. 796, not to be within the scope of his employment or within the scope of his license, if he had a license by custom to go back to the caboose after his clothing that he had left there. The annotation to this case shows the authorities on liability for injuries to a servant in performance of duties outside the scope of his original contract.

Digest of Unreported Judgments.

In Ontario, whatever may be the case in the other Provinces of the Dominion, we have every year, owing to the industry and assiduity of the Judges of the Court of Appeal and High Court of Justice, a large number of considered judicial opinions which, for one reason or another, do not find their way into the reports. It may be safely said that many of such unreported judgments contains expositions of the law valuable to men in active practice. It may be that the law upon a given point is well settled, and that it is useless to multiply reports of cases bearing thereon. It may be that a certain judicial opinion simply applies well-settled law to a novel set of facts. Again, a judgment may be entirely upon a question of fact. But in all these cases it is not unnatural that one or more members of the legal profession should desire to have the benefit of perusing the unreported opinion. Perhaps it may not, when perused, turn out to be useful in the direction sought, or perhaps it may; but, whether or not, it is desirable that all should have the opportunity, at least, of obtaining access to such judgments. We do not in the very slightest degree find fault with the discretion exercised in excluding many judicial opinions from the reports. There are always cases which clearly are "reportable," others which obviously are "unreportable," and a residue of doubtful cases. The benefit of the doubt is in a majority of instances given to the latter class, and they are reported. Usually, fault is found with reporters for reporting too many cases. We know that

sometimes it is very difficult to draw the line. But we maintain that all lawyers in Ontario in active practice should have ready access to such opinions as may, in the discretion of those who have the burden of deciding, be left unreported. And, to make them easy of access, we propose to add to the ANNUAL DIGEST of the CANADIAN LAW TIMES, a supplementary index-digest of considered judicial opinions of the Ontario Judges not reported in the Law Society reports nor noted in the OCCASIONAL NOTES. This will mean a very considerable addition to the labour involved in preparing the new digest, but we are confident that it will be of value and will be appreciated by the readers of the CANADIAN LAW TIMES. We propose to give in this supplementary index-digest a trustworthy indication of the nature of each unreported case, and such information as will enable our subscribers to procure a perusal of the opinion itself if they deem it advisable. We firmly believe that this is what the newspapers term "a long-felt want," and we are confident that what we shall give will meet the demand. Further, we propose next year to give each month an index-digest of such cases, and to consolidate it at the end of the year. Ontario lawyers will benefit chiefly, but, as Ontario decisions seem to be much regarded in the other Provinces, we sincerely hope that the work may be one "for the general advantage of Canada."

BOOK REVIEWS.

Le Roman d'une Pussie Chat. By Frederick Rogers, D.C.L. (Trin. Coll. Tor.) of Osgoode Hall, Barrister-at-Law. Detroit, Mich., U.S.: American Publishing Co. (1900.)

Dr. Rogers has written a story about Canadians and Canada's fairy land. The book is bright and attractive, and in parts amusing and original. The character and plot both belong to the new world, and treat, not of gods and goddesses, of elves and fairies, of charms and witchery, but of men and women, simple, honest, hearty folk,—the people of the Grimalkins.

Ewart on Estoppel. An Exposition of the Principles of Estoppel by Misrepresentation. By John S. Ewart, Q.C., of Winnipeg, Manitoba. Toronto: The Carswell Company, Limited. (1900.)

We shall next month give our readers an extended review of this work, as its importance demands.

General Digest, American and English. Bi-monthly digest (advance sheets) of the decisions first reported during the months of June and July, 1900. Rochester, N. Y.: The Lawyers' Co-operative Publishing Co.

This is a good digest, and, as it includes English and Canadian as well as American cases, a very useful one to a Canadian lawyer. The publishers are very enterprising.

The Canadian Law of Partnership. By R. B. Henderson and Peers Davidson. Montreal: The Snow Law Publishing Co.

This work on the Canadian law of partnership bases its statements of the general principles of partnership law upon the Imperial Partnership Act, codifying to a considerable extent that branch of the law. This statute has been adopted in Manitoba, the North-West Territories, and British Columbia, but not by the other Provinces of the Dominion.

The authors are Messrs. R. B. Henderson, of the Toronto Bar, and Peers Davidson, of the Montreal Bar. They have pointed out the extent to which the codifying Act varies from the common law, and have collected the various provincial statutes so as to make the book a compendium of the law of partnership for each of the Provinces. The law of the Province of Quebec is so radically different from that of the other Provinces, that Mr. Davidson has dealt separately with the Quebec law of partnership. The authors have also collected the Canadian case law upon the subject in each of the Provinces. The work will, therefore, prove useful to Canadian lawyers.

We are not able to speak equally well of the typographical appearance of the book, which is unpleasing to the eye. This arises partly from the fact that the margin is too narrow for the amount of printed matter on the page, and partly from the fact that the cases are run into the body of the text, and are printed not in italics, but in ordinary type.

The Albany Law Journal. Albany: The Albany Law Journal Co.

This "weekly record of the law and the lawyers" keeps up to the mark. The issue of the 13th October last contains a very interesting article by Mr. Louis Sandheim on "Defending a Guilty Client;" an able editorial on "Ratification of Agent's Contract;" and a discussion of the meaning of the words "in the presence of the testator," à propos of the recent Minnesota case of Cunningham v. Cunningham — in which the will was upheld where it appeared that the witnesses signed in a room adjoining that in which the testator was, the door being open between, but the witnesses not being actually in sight whilst engaged in signing; besides other articles of less general interest.

THE

CANADIAN LAW TIMES.

DECEMBER, 1900.

IS AN INTERPLEADER PROCEEDING AN ACTION?

THE question has often been asked in statutory interpleader—Is an interpleader proceeding "an action" or "a proceeding in an action?"—but the judicial deliverances upon this apparently simple matter are many and conflicting. Closely related is the further question, which applies to interpleader generally—Is the order or judgment which is made in interpleader to be regarded as final or interlocutory?—and the decisions upon this are also in some degree confusing.

The following paragraphs contain in chronological order the views which have been expressed by the Courts upon the above questions and upon some kindred matters.

In 1823 in New York—The decree obtained by the plaintiff upon a bill of interpleader is looked upon as final, so far as he is concerned, and not interlocutory (*a*).

In 1841 in England—A feigned issue cannot be considered as within the term "action:" the Interpleader Act speaks of an issue and an action as two different things (*b*).

In 1845 in England—In effect, the feigned issue and the judgment thereon is no more than an interlocutory proceeding in another suit, in the nature of an interlocutory judgment, wherein the Court is subsequently to act, in dispensing the rights of the parties. It was held, therefore, that a writ of error would not lie from the trial of an interpleader issue (*c*).

(*a*) Atkinson v. Manks (1823), 1 Cow. N. Y. 691.
(*b*) Lott v. Melville (1841), 9 Dowl. 822.
(*c*) King v. Simmonds (1845), 7 Q. B. at p. 311.

In 1859 in England—The language, "upon the trial of any cause," applies to an interpleader cause. The mischief to be remedied is just as great, for most important rights may be decided in an interpleader cause. "Upon the trial of any cause" is upon the trial of any cause which can come legitimately before a Court. It was decided, therefore, in a sheriff's case, that an appeal lay from the trial of an interpleader issue (*d*).

In 1860 in Upper Canada—Following the practice in England, an appeal lies from the judgment on an interpleader issue, as the term "cause" covers an interpleader cause (*e*).

In 1862 in England—Erle, C.J., said:—"I do not see why the word 'cause' should not embrace an interpleader issue. The importance of learning the truth is just as great, in an interpleader, as in any other cause. There are two parties, and there is a matter in dispute. It was therefore held that interrogatories might be delivered in an interpleader issue (*f*).

In 1864 in Upper Canada—Though possessing many of the characteristics of an action, an interpleader proceeding is not strictly a suit in the eye of the law. It was decided, therefore, that an order to rescind the issue must be made in the original cause (*g*).

In 1872 in Maryland—A decree passed upon a bill of interpleader before answers are filed, requiring the fund to be paid into Court, and enjoining the defendants from further proceedings and requiring them to interplead, is interlocutory and settles the right of no party, and is at all times before a final decree subject to revision and alteration, being merely ancillary to further procedings (*h*).

In 1873 in Ohio—It was not intended by the substitution of a third party for the defendant interpleading, to

(*d*) Withers v. Parker (1859), 4 H. & N. p. 814, Erle, J.

(*e*) Wilson v. Kerr (1860), 18 U. C. R. 470; Feehan v. Bank of Toronto (1860), 10 C. P. 32.

(*f*) White v. Watts (1862), 12 C. B. N. S. p. 271.

(*g*) Salter v. McLeod (1864), 10 U. C. L. J. O. S. 299.

(*h*) Barth v. Rosenfield (1872), 36 Md. 604; followed in Heald v. Rhind (1897), 86 Md. 320.

change the nature of the case from a civil action to a statutory special proceeding, and thereby to deprive the parties of the rights incident to a trial in a civil action. The action remains though the parties be changed. The issues to be tried remain essentially the same as they would have been had there been no change of parties to the record, and the plaintiff cannot be deprived by the change of defendants of the rights of a party to a civil action, merely because he is forced to contend with a new and perhaps more formidable antagonist (*i*).

In 1874 in Ontario—An interpleader proceeding is a proceeding which comes within the meaning of the words "an action at law," and therefore a party to an issue may be examined for discovery (*j*).

In 1877 in England—A judgment on the trial of an issue is an interlocutory one. Rule 2 of Order I. provides, with respect to interpleader, that the procedure and practice now used by Courts of common law, under the Interpleader Act, shall apply to all actions and all the Divisions of the High Court, and the application by a defendant shall be made at any time after being served with a writ of summons, and before delivering a defence. Under the Interpleader Act the process of interpleader may be carried out either by making the claimant defendant in the action in which the application for an interpleader order is made, or in some other action, or by the more common process of a feigned issue. If the last mode is adopted, the interpleader issue becomes a process ancillary to the original action, which is still kept alive for the purpose of enabling the Judge seized of the matter, after judgment has been given upon the interpleader issue, to finally adjust the rights of all parties, and to settle all outstanding questions of costs. Although it is true that interpleader issues partake in some measure of the character of actions, and that the findings upon them do substantially determine the questions between the parties to such issues, yet still they are not, strictly

(*i*) **Maginnis v. Schwab (1873), 24 Ohio St. 342.**
(*j*) **Canada Permanent L. & S. Co. v. Forest (1874) 6 P. R. 254.**

speaking, actions, but are more analogous to inquiries directed in the course of actions. It is to be observed that it is only by the final order made in the action, out of which the interpleader springs, that the directions necessary to terminate all the questions, even between the parties to the issue, are finally given. The determination upon the issue is a condition precedent to the final determination of the action, and that fact demonstrates the inconvenience and delay which would result from its being held that the order determining the issue is a final order, entitling the successful party to it to delay any appeal, and thus staying the hands of the Court at first instance, as regards the original action, or putting the parties to the expense of a final order in the action, which would require to be set aside, if the order upon the interpleader issue turned out to be wrong (*k*). Two actions had been brought relating to a cargo, and an interpleader issue directed to try the question to whom it belonged. The issue having been tried, the question was, whether the judgment should be appealed from as a final or as an interlocutory judgment.

In 1878 in Ontario—The proceeding, a sheriff's interpleader, is not a step in the original suit in which the *fi. fa.* issued, though it arises from what has been done under the writ of execution issued in that cause. The claimant of the goods is not a party to that suit, neither is the sheriff. They are merely parties to the collateral proceeding authorized by the statute for the protection of the sheriff (*l*).

In 1880 in England—Interpleader is not an action, either in the strict or in any conventional sense. Under the Judicature Act, an action is a civil proceeding, commenced by writ, or in such other manner as may be presented by Rules of Court. I find no Rule of Court prescribing the commencement of interpleader proceedings in any other manner. On the contrary, interpleader is treated by Order I., Rule 2, as a proceeding in an action, and so it was held, that a notice for trial without a jury could not be given under Rules which only mentioned actions (*m*).

(*k*) McAndrew v. Barker (1877), 7 Ch. D. 701.
(*l*) Wilson v. Wilson (1878), 3 A. R. 400.
(*m*) Hamlyn v. Betteley (1880), 6 Q. B. D p. 66.

Interpleader in England is now regulated by Rules of Court and not by a statute as in 1880.

In 1880 in Ireland—An order disposing of a sheriff's interpleader, and directing the execution creditor who did not appear to pay the costs, is not equivalent to a judgment in an action (*n*).

In 1881 in England—The Court of Appeal in considering whether costs incurred in the action in which an execution issued should be set off against costs in the interpleading proceeding which followed, as being costs of the same proceeding, decided that they could not, because, it was said, an interpleader is a proceeding as distinct from the action as possible. The proceeding is certainly entitled in the action, but that is only a convenient mode of identifying it; it would be more correct to entitle it in the matter of the execution (*o*).

In 1883 in Ontario—Interpleader is not an action, but a proceeding in an action (*p*).

In 1883 in England—Under the old practice, the Judge on the trial of an issue only gave interlocutory judgment, which was afterwards settled at Chambers; now it is unnecessary to go to Chambers, and the presiding Judge gives final judgment (*q*).

In 1884 in Manitoba—An interpleader is not a cause, and is never spoken of as such, and so does not come within the Rule that when a cause is at issue the defendant may give notice of trial (*r*).

In 1886 in England—Upon an appeal to the Court of Appeal from an order of a Divisional Court dismissing an appeal from the finding of the Judge who tried an interpleader issue transferred to a County Court, it was contended that the order made by the Divisional Court upon the first appeal was an interlocutory order, and that notice of appeal

(*n*) **Booth v. Egan (1880), 6 Ir. R. C. L. 282.**
(*o*) **Barker v. Hemming (1881), 43 L. T. N. S. 678.**
(*p*) **Coulson v. Spiers (1883), 9 P. R. 492.**
(*q*) **Burstall v. Bryant (1883), 12 Q. B. D. p. 104.**
(*r*) **Plaxton v. Monkman (1884), 1 Man. L. R. 371.**

had not been given properly, the Court overruled the objection and held that the order was a final order (*s*).

In 1887 in England—An interpleader proceeding is not within the term "action" in a statute which provides that with the leave of the Judge an appeal shall lie in certain actions (*t*).

In 1887 in Pennsylvania—An issue under the Sheriff's Interpleader Act is not within a statute which provides that it shall be lawful for either party in any civil suit or action to choose arbitrators for the trial of matters in variance (*u*).

In 1887 in Canada—The finding and judgment upon the trial of the issue is a judicial determination upon the merits of the matter in consideration, as much as a like judgment upon matters in contestation between plaintiffs and defendants in an action. The necessity of obtaining a final order in the original suit can have no effect whatever in making the adjudication upon the merits in the issue a whit more final than it already is. The judgment upon an issue tried, on the application of a sheriff for protection from claims made to property seized in execution, and determining conclusively, until reversed by some Court of competent jurisdiction, the rights of the execution creditor to the fruits of the seizure as against the claimant, is of a different character from a judgment on an interpleader issue, ordered in the progress of a suit for the purpose of determining a point necessary to be determined before judgment can be pronounced in the suit, during the progress of which the interpleader has been ordered. The words "judgment in a cause or matter depending in any Court" are abundantly sufficient to include and must be construed to include an interpleader issue and the matter in contestation therein (*v*).

In 1887 in England—Proceedings in interpleader are substantially a second action. The fact that proceedings in interpleader are a second litigation is not disposed of by

(*s*) Hughes v. Little (1886), 18 Q. B. D. 32.
(*t*) Collis v. Lewis (1887), 20 Q. B. D. 202.
(*u*) VanAuken v. Buxton (1887), 1 Mona. Pa. 399.
(*v*) Hovey v. Whiting (1887), 14 S. C. R. pp. 515, 524, 525, and 527

suggesting that for some technical purposes they are regarded as part of the original action. Names are nothing. Interpleader at the instance of the sheriff is not a natural consequence of a judgment in favour of the plaintiff in an action. It is another proceeding, and it rests with the plaintiff to say whether he will, or will not, become a party to the new issue. The only authority which the industry of counsel has discovered, to the contrary, is the dictum of Lord Selborne in 1880, to the effect that interpleader is not an action but a proceeding in an action. This dictum refers not to the present question, but to the forms of procedure under the Interpleader Act (*w*). The point turning on this was that a solicitor, under an ordinary retainer, has no authority without special instruction to engage in proceedings in interpleader.

In 1888 in Manitoba—An interpleader issue is within the term "action" (*x*), and may be entered for trial on a Tuesday.

In 1888 in Ontario—Proceedings in interpleader are substantially a second action, and a solicitor retained to collect a debt is not entitled to interplead, without a further retainer for that purpose (*y*).

In 1891 in England—The judgment upon the trial of an interpleader issue is really in the nature of an interlocutory decision; it is not a final judgment. It is a judgment upon a proceeding which is itself in the nature of an interlocutory proceeding. The interpleader proceeding may be an action within the meaning of the Rules. There is no substantial change in the old law. Under the old law, the Judge tried the issue which had been directed at Chambers, that is, it was only a step in the regulation of the entire rights of the parties, and the complete adjustment of the rights took place in Chambers after the issue had been tried. But there was obviously an inconvenience in having to go back again to Chambers, when the Judge had at the trial of the issue all the parties before him, or could easily have got

(*w*) James v. Ricknell (1887), 20 Q. B. D. pp. 166 and 167.
(*x*) Douglas v. Burnham (1888), 5 Man. L. R. 261.
(*y*) Hackett v. Bible (1888), 12 P. R. 182.

them before him, and certainly could better adjust the rights with knowledge of all the circumstances, than a Judge at Chambers hearing that part of the case afterwards, and for that purpose the Rules of Court wisely prescribe that the Judge who tries the issue shall be clothed with the power, if he choose, of finally adjusting all the rights of the parties, instead of the Judge at Chambers. It confers upon the Judge sitting to try the issue all the authority and all the functions of a Judge sitting in Chambers (*z*).

In 1892 in Manitoba—A Rule which empowers a Judge sitting at nisi prius "at all times to amend all defects and errors in any proceedings in civil cases" is wide enough to embrace an interpleader issue (*a*).

In 1893 in Ontario—Where it appeared that the original action in which execution issued was in one county, and the interpleader proceedings in another, it was held that the local Judge of the first county had jurisdiction to make an order for the examination of one of the parties to the issue, because the interpleader application was a step in the first action (*b*).

In 1893 in England—Under a Rule which gives a district registrar, when a cause or matter is proceeding in his district, all such authority and jurisdiction as may be exercised by a Judge at Chambers, it was held that the district registrar had no jurisdiction to make an interpleader order, but that such application must be made to the Master in London (*c*).

In 1895 in Ontario—An interpleader proceeding is not an action, and a rule which enables the Court to order an action to be discontinued upon terms as to costs does not apply to interpleader issues (*d*).

In 1897 in Ontario—With the object of making the matter clear, in the face of so many conflicting authorities, a Rule having the force of a statute was adopted in Ontario

(*z*) MacNair v. Audenshaw, [1891] 2 Q. B. 502.
(*a*) Fisher v. Brock (1892), 8 Man. L. R. 137.
(*b*) Calder v. McLay, 23rd January, 1893, unreported.
(*c*) Hood v. Yates, [1893] W. N. 190.
(*d*) Hogaboom v. Gillies (1895), 16 P. R. 402.

in 1897 which provides, that "action," as defined by the Judicature Act, shall include proceedings for relief by interpleader (*e*).

In 1898 in Ontario—An order made on a sheriff's application directing an issue, if the claimant should give security, and otherwise directing that the goods be sold and the proceeds paid to the execution creditor, is not in its nature final but merely interlocutory (*f*).

It is not possible to reconcile all those conflicting decisions, and it might be presumption on the part of the writer to attempt to extract from them, rules which should be followed under all circumstances. It was at his suggestion, and to end such diversity, that the Ontario statutory Rule was passed which enacts that "action" shall include proceedings for relief by interpleader. This consideration of the practice in interpleader is important, and some further remarks upon it may be permissible, as it has not as yet been comprehensively dealt with in any reported decision.

The terms "interpleader proceedings" and "interpleader proceeding" are somewhat ambiguous. They may mean the whole proceeding, or some part of it. There are always two distinct parts to each interpleader litigation. First, the triangular contest in which the stakeholder comes into Court in company with the two adverse claimants, either by bill or interpleader, or in an action of interpleader, or in statutory interpleader in a more summary and simple way by summons, petition, or motion; and, secondly, the litigation which follows, between the claimants alone, generally taking the form of an issue or an action (*g*).

An interpleader proceeding, though simple and summary, is, when examined, of considerable force and wide effect. Take the case of a stakeholder who has been sued by both claimants; he comes into Court, and in an expeditious manner, without the usual preparatory steps of an ordinary suit, and generally without a trial, obtains an injunction which stays both actions so far as they concern him,

(*e*) Rules of 1897, sec. 6 (*e*).
(*f*) Hunter v. Hunter (1898), 18 Occ. N. 114.
(*g*) See Temple v. Temple (1894), 10 R. 269.

dismisses him out of Court with his costs, and directs the two claimants to proceed in a litigation not of their own choosing. A proceeding which is allowed to accomplish so much, with such simple legal machinery, should not be lightly regarded. The substance should be looked at rather than the form. If it is of equal length to an action, it should be so viewed, and should receive a liberal rather than a technical construction.

As interpleader is sometimes designated an extraordinary remedy, and is, besides, special in its character; it follows naturally that it has not under any system of judicature a full code of procedure of its own, which will permit all the steps usually taken by the parties preliminary to a trial in a modern action. It becomes of importance, therefore, to be able to say that an interpleader proceeding, in any or all of its several forms, is equivalent to an action or suit, because all the procedure relating to actions or suits generally then applies when necessary to issues as well. The parties in interpleader will then have the same advantages in getting ready for a trial or hearing as have other suitors, while the dissatisfied claimant will have the customary opportunity of reviewing the decision at the trial before a higher Court. The fact that it is optional with the Court to say whether the claimants shall continue their litigation in a proceeding designated an interpleader issue, or in an action as ordinarily understood, makes it reasonable to suggest that the parties should have equal facilities in either form of proceeding. It is scarcely fair that a plaintiff in an issue should possibly be deprived of the right to production, or discovery, or a jury, or discontinuance, or appeal, as the case may be, when all these come as a matter of right to another claimant, who, fortunately for him, is to maintain his rights as plaintiff in an action.

The terms "action," "cause," and "suit," apart from any special statutory definition, seem broad enough to cover the form and matter which are found in interpleader litigation. As the tendency in modern times is to give the remedy a broad and liberal construction in favour of the party requiring relief, it seems reasonable that an interpleader proceeding should always be given the importance

and weight which it deserves, even when a question at issue is between the two claimants, rather than that it should be looked upon as something less important than a suit or action. All technical questions and objections should as far as possible be brushed aside.

The tendency in England has been to regard the issue between the claimants in a narrow way, rather as a derivative proceeding than as an original one, and to designate it as a proceeding in an action, and not as equivalent in substance to an action.

Notwithstanding the decisions to the contrary in England and Canada, it is submitted that an interpleader proceeding is within the term "action," when that word is defined by statute to mean,—"a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court." An interpleader proceeding is clearly a civil proceeding which is commenced as prescribed by a Rule of Court (*h*).

In the United States a broader view is taken. When the claimants are compelled to contest between themselves, as the result of the stakeholder's act in seeking deliverance from their threatened actions, they stand before the Court to litigate the question between them, to the same extent as if one had filed a bill against the other, they occupy the positions of plaintiff and defendant; and when an action against the stakeholder is continued, with the outside claimant substituted as defendant, the litigation does not change from a civil action to a special statutory proceeding, and the parties are not deprived of the rights incident to a trial in a civil action (*i*).

It is of course clear that an interpleader cannot be a proceeding in an action, so far as the applicant is concerned, when no action has been brought by either claimant before the interpleader appplication. It is hardly logical to say

(*h*) See Re Fawsitt (1885), 30 Ch. D 231; Re Vardon (1885), 31 Ch. D. 275; Re Wallis (1888), 23 L. R. Ir. 7. Contra, McAndrew v. Barker (1877), 7 Ch. D. 701, decided before interpleader was governed by Rules.

(*i*) Maginnis v. Schwab (1873), 24 Ohio St 342.

that it is, even when an action does exist. It is more correct to say that it arises by reason of the action having been commenced, or that it is entitled in the action.

In the case of a sheriff under the English practice, he comes into Court as a new party himself, bringing in a second new party in the person of the claimant, while the subject-matter, the goods seized, are also entirely new. The only remanent of the action in which the execution issued, is the successful party there, who now comes in under a new name, as the execution creditor. Can it be said with any consistency that the sheriff's application is a proceeding in the action? If it can, what will the answer be, where a sheriff has seized under two different executions, and has entitled his proceeding in both? Which action is it a proceeding in? A sheriff's application is substantially a new and original proceeding, no matter what its form.

It is also impossible to extract from the above decisions a rule which shall say whether the order or judgment in some part of interpleader proceedings is in each particular case final or interlocutory. The judgment or order which is obtained by the person seeking relief is clearly final so far as he is concerned; it gives him his remedy and sends him out of Court for good. But the same judgment or order may be interlocutory so far as the claimants are concerned, as it merely puts them in motion to have their rights decided in an action or issue.

R. J. MACLENNAN.

Toronto.

WHEN THE IMPOSSIBLE EXCUSES.

Lex non cogit ad impossibilia.

When, and when not, there is an implied condition in a contract, after its performance has become impossible, such as discharges the contracting parties, is a question fraught with considerable difficulty, and one which has led to diversity of opinion among the Judges. All cases arising in this branch of the law, however, are referable to well established rules or certain well defined exceptions thereto. The difficulty arises in adapting the rules and exceptions to the varying cases.

The rule has long since been established, that one may bind himself by an absolute contract to do an act which subsequently becomes impossible, or pay damages for non-performance, where the event which caused the impossibility might have been anticipated and guarded against in the contract. In 1855 Maule, J., in Canham v. Barry (*a*), observed:—"A man may, no doubt, for a good consideration contract to do that which he cannot be sure that he will be able to do; a man may, if he chooses, covenant that it shall not rain to-morrow." The reason of the rule is, it was the fault or folly of the contractor, that he did not protect himself by specific exceptions in the contract.

On the other hand, however, if the contract were of such a nature that its performance was contemplated as being dependent on the continued existence of the subject of the contract; or such as it could not have reasonably been contemplated by the contracting parties that a contingency would arise to render its performance impossible, then in such a case the parties are excused in the event of impossibility of performance. This rule was tersely illustrated by Lord Coke in Shelley's case (*b*), in these words:—"If a lessee covenants to leave a wood in as good a plight as the wood was at the time of the lease, and afterwards the trees are blown down by

(*a*) 15 C. B. 619.
(*b*) 1 Coke at p. 98.

tempest, he is discharged of his covenant, *quia impotentia excusat legem.*" The reason being, that the covenant was intended to relate only to the tenant's own acts, and not to an event beyond his control, producing effects not in his power to remedy.

Further, if at the time of the making of the contract it was known that the thing agreed to be done was physically or legally impossible of performance, the contract will be void, unless the promisor has taken upon himself to warrant that it is possible.

A clear recognition of these three leading principles will do much to solve the nice questions constantly arising in this branch of the law.

The recent case of Nickoll v. Ashton (*c*), being the last deliverance on the question, affords a good illustration of the principles under consideration. In this case the defendants sold to the plaintiffs, by contract made in October, 1899, a cargo of cotton seed, to be shipped at certain ports in Egypt, in the month of January, 1900, per steamship Orlando, and to be delivered to the plaintiffs in the United Kingdom. The contract was subject to the following particular exceptions: "In case of prohibition of export, blockade or hostilities, preventing shipment, this contract or any unfulfilled part thereof is to be cancelled." The Orlando when chartered was in the Baltic. She had been chartered by third parties from whom the defendants had bought the cargo in question. In the month of December she was stranded in the Sound by perils of the sea, and was so much damaged as to render it impossible for her to arrive at the ports of loading within the time stipulated. Notice of the stranding was given to the plaintiffs on the 20th December. On the 28th December the defendants wrote to the plaintiffs to the effect that, as the performance of the contract was rendered impossible, they considered it cancelled. Action was brought for breach of contract, claiming as damages the difference between the contract price and the market price at the end of January. For the plaintiffs it was contended that the contract was absolute, and consequently there was an implied warranty that the steamer would be fit to

(*c*) [1900] 2 Q. B. 298.

take the cargo on board at the time specified. And further, that, as the defendants had not provided against such a contingency, they had taken the risk of the steamer being disabled or lost by perils of the sea. That it was the fault or folly of the defendants that they had not excepted themselves from responsibility in the event of the steamer being stranded or lost. It was further contended, on the part of the plaintiffs, that the contract was subject only to the particular exceptions specified in the charterparty, and no other could be implied according to the well-known maxim *expressum facit cessare tacitum*, or that other equally well-known *expressio unius est exclusio alterius*.

For the defendants it was argued that the performance of the contract was contemplated by the parties as being dependent on the continued existence of the ship in a fit condition to receive the cargo, and a stipulation to that effect must be implied. In other words, that a condition ought to be implied that the defendants should be excused from performance of the contract when performance became impossible by the loss or damage of the ship by sea peril.

Matthew, J., in delivering judgment for the defendants, the cause having been tried without a jury, said:—"It seems to me that the defendants' contention is right, and that under the circumstances the contract was at an end. It had become impossible of performance, and the condition ought to be implied that neither party was to be bound."

The case of Taylor v. Caldwell (*d*) was decided upon like principles. In this case the defendants agreed to let, and the plaintiffs to take, the Surrey Music Hall and Gardens for the purpose of holding concerts. The hall was destroyed by fire before the time for giving the concerts. It was held that both parties were excused from performance. In the course of his judgment Blackburn, J., observed:—"The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. . . . It may, we think, be safely asserted to be now English law, that in all

(*d*) 3 B. & S. 826.

contracts of loan of chattels or bailments, if the performance of the promise of the borrower or bailee to return the things lent or bailed becomes impossible, because it has perished, the impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to re-deliver the chattel."

In 1871 the like principle was re-affirmed in Robinson v. Davison (*e*). The plaintiff contracted with the defendant's wife that she would play the piano, on a day named, at a concert. On the day in question she was unable to perform through illness. In an action for breach of contract, it was held that the defendant was excused on the ground of his wife's illness, as the contract was not absolute, but conditional upon her being well enough to perform. Cleasby, B., is thus reported in his judgment:—"This is a contract that a lady should perform as a pianist; that is, should undertake a duty requiring a high degree of skill and taste, and one which if not performed properly can hardly be said to have been performed at all. It is, moreover, a duty which could not be done by a deputy, but only by the lady herself. and, that being so, I think that disability or incapacity, caused by the act of God, excuses the defendant. The whole contract between the parties was based upon the assumption by both that the performer would continue living, and in sufficient health to play on the day named. This was really the very foundation of the promise, and where the foundation fails the promise built on it must fail also."

To the like effect was the judgment in Howell v. Coupland (*f*), in 1876. The defendant agreed to sell 200 tons of Regent potatoes grown on land belonging to him in Whaplode. The crop was attacked by disease, and the defendant was able to deliver only about 80 tons. The Court held that the contract was subject to the implied condition that if before breach performance became impossible from the perishing of the thing the contractor was excused, if without any default on his part. The judgment of Cleasby, B., puts the matter in a very clear light. "I put my decision," said the

(*e*) L. R. 6 Ex. 269.
(*f*) 1 Q. B. D. 258.

learned Baron, "not so much on the ground that the defendant was excused by the act of God rendering the performance impossible, as upon the terms of the contract itself. This is not like a contract where the parties have agreed to deliver a cargo of grain at Odessa or any other port by a given time, in which case the parties are bound by the contract, although its performance has become impossible by *vis major*. Here there was not an absolute contract to deliver 200 tons of potatoes in September and October, but 200 tons of potatoes grown on particular land. Not 200 tons of potatoes simply, but 200 tons off particular land. The crop on this particular land has failed, and there is nothing to which the promise can apply. If the crop had existed at the time of the contract, and had afterwards failed, there can be no doubt that the principle of the decided cases would apply and the defendant would be excused; and I cannot see any difference in principle from the fact that the crop had not been sown at the date of the contract."

A recent decision, in the Queen's Bench, that of Ashmore v. Cox (*g*), at first blush would seem not to harmonize with that of Howell v. Coupland. The cases, however, on careful examination are distinguishable. In Ashmore v. Cox the plaintiffs bought 250 bales of Manila hemp, which the defendants agreed to ship from a port or ports in the Philippine Islands by vessels between the 1st May and the *31st July*, 1898. The agreement contained a clause that the *contract* was to be void in case the goods did not arrive from loss of vessel or other unavoidable cause. It became impossible for the defendants to ship the hemp by vessels between the specified dates on account of the Spanish-American war. In September, however, they shipped hemp by steamer and declared it against the contract. The plaintiffs refused to accept this declaration, and returned it. For the plaintiffs it was contended that the contract was an absolute undertaking by the defendants that the goods should be shipped on vessels and between certain dates, and no implied condition should be read into it; that the defendants were not protected by the express words of the contract; that the expression "other unavoidable cause" must be read as *ejusdem*

(*g*) [1899] 1 Q. B. 436.

generis with loss of vessel, and could have no application until after the goods have been shipped under the contract; that Howell v. Coupland was distinguishable in this, that the contract was for the sale of a specific crop, to be grown on specific land, and before breach a large part of the crop perished without default on the seller's part. For the defendants it was argued that they were excused from the fulfilment of the contract by reason of its performance having become impossible from the existence of war; that it was an implied condition of the contract that the shipment by vessels between the dates specified should be possible. Lord Rcssell, C.J., thus distinguishes between the cases:—"In my judgment that case, Howell v. Coupland, is no authority for the proposition here contended for; it turned on the construction of the contract in that case. The Court there construed the contract as meaning that the buyer took the chance of the contract being defeated in its performance by failure of the potato crop by disease, the seller using all reasonable skill. That has no bearing upon the present case. Here the stipulations are that the defendants shall sell 250 bales of hemp; that the shipment should be made from the Philippine Islands, that it shall be made by sailer or sailers, that it shall be made between the named dates, and that the declaration shall be made in the manner provided in the contract. The defendants have taken upon themselves the absolute responsibility of being able to make a declaration complying with the contract and appropriating to the contract 250 bales of the commodity shipped by sailer or sailers between the 1st May and the 31st July, 1898. They have taken upon themselves (subject to the concluding clause of the contract) the responsibility that these events shall take place, or that they will pay damages if from any cause they are prevented from carrying out the contract. . . . In my judgment the facts in this case do not shew that the non-arrival of the goods in London was caused by any unavoidable cause within the meaning of the contract."

As has already been observed, contracts are made upon the supposed existence of the subject of contract, and if at the time the contract was made it had ceased to exist, by inevitable accident, performance is excused for the obvious

reason that the contract contemplated an existing something capable of being the subject of contract. *Actus Dei nemini facit injuriam.* See Conturier v. Hastie (*h*).

Likewise, as parties contract with reference to the existing state of the law, the promisor is excused by the intervention of the act of the Legislature rendering its performance of impossible. *Actus legis nulli facit injuriam.* See Baily v. DeCrespigny (*i*).

There are authorities to the effect that imprisonment for crime will exonerate a workman from the necessity of giving to his employer notice before leaving his service, when by the terms of hiring such service is required under the penalty of forfeiture of wages. In Hughes v. Wamsutta Mills Co. (*j*) the plaintiff, an emyloyee of the defendant company, had agreed to give two weeks' notice before leaving or not claim any wages due. During the hiring he was arrested for a criminal offence, tried, convicted, and imprisoned. In an action for balance of wages due at time of arrest, it was proved that no notice of leaving was given. The Court, however, held that the involuntary abandonment of the work was no bar to his right of recovery, although notice had not been given. Chief Justice Biglow, in delivering the judgment of the Court, said:—"It is settled that absence from sickness or other visitation of God would not work a forfeiture of wages under such a contract. *Pari ratione*, any abandonment caused by unforeseen circumstances or events, and which at the time of their occurrence the person employed could not control or prevent from operating to terminate his employment, ought not to operate to cause a forfeiture of wages. . . . It may be said that in the case at bar the commission of the offence for which the plaintiff was arrested was his voluntary act, and that the consequences which followed after it and led to his compulsory departure from the defendants' service are therefore to be regarded as bringing this case within the category of a voluntary abandonment of his employment. But the difficulty with this argu-

(*h*) 5 H. L. C. 678.
(*i*) L. R. 4 Q. B. 180.
(*j*) 11 Allen (Mass.) 201.

ment is, that it confounds remote with proximate causes. The same argument might be used in case of inability to continue in service occasioned by sickness or severe bodily injury. It might be shown in such a case that some voluntary act of improvidence or carelessness led directly to the physical consequences which disabled a party from continuing his services under a contract. The true and reasonable rule of interpretation to be applied to such contracts is this. To work a forfeiture of wages, the abandonment of the employer's service must be the direct, voluntary act, or the natural and necessary consequences of some voluntary act of the person employed, or the result of some act committed by him with a design to terminate the contract or employment, or render its further prosecution impossible."

By the Sale of Goods Act, 56 & 57 V. c. 71, s. 7, a sale of specific goods is avoided if they perish before the risk has passed to the buyer, through no default of either party.

Also a contract to do an act which after the contract is made becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

SILAS ALWARD.

St. John, N.B.

EDITORIAL REVIEW.

The Vacancy on the Ontario Bench.

It is most important that the appointment of a Judge in the Queen's Bench Division should be made at once. Not only is it inconvenient that there should be a vacancy for five months, or indeed for one month, but the kind of discussion and canvassing that is going on is scandalous, and should be put a stop to at once, or it will seriously prejudice the position of any gentleman who shall in the end be appointed. It may be conceded that Ministers of the Crown have a right to appoint their own friends to judicial offices, provided that fitness therefor is assured. It may also be conceded that fitness is as likely to be found on one side as the other—that suitable men may be found on both sides. But no further concession can or ought to be made by those who are concerned for the welfare of the country and desire to see the occupants of the Bench held in respect and esteem. There is no justification for paying regard to any man's religious creed in this connection. It is speciously said that members of a certain church, or branch of the Church, should be "represented" on the Bench. There could be no more pernicious doctrine than this. If an eminent barrister were passed over *because* of his faith, because he was a member of a certain church, there would be a clear case of injustice. But no one alleges or supposes that there has been such a case in the last fifty years. If it is true that no man should be debarred from office on account of his creed, it is equally true that no man should be appointed to office on account of his creed. It is painful to have to allude to such a matter as this. Every decent man in Ontario earnestly hopes that the vacant office will be filled without further delay by the appointment of the best available lawyer without regard to the form of his religious belief, or the locality where he has practised—which have just the same importance as the colour of his hair.

Lawyers in the House.

We have made an effort to present to our readers, as a matter of some interest, a list of barristers and solicitors in the various Provinces who have been elected to the new House of Commons for Canada. Unfortunately, it has not been possible to obtain a complete list up to the time of publication of the present number. In our next issue we hope to give an exact summary and some interesting particulars.

At the time of writing, as nearly as can be ascertained, there are 54 lawyers elected—about one-fourth of the whole House. There are 22 in Ontario, 22 in Quebec, 4 (conjecturally) in Nova Scotia, 3 in New Brunswick, 2 in Manitoba, 1 in Prince Edward Island, none in British Columbia, and none in the Territories.

Mr. B. B. Osler, Q.C.

The news that Mr. Osler has recovered from his long and serious illness will be welcomed by the Bar of Ontario. It is to be hoped that he will very soon be among us again.

The Law and the Newspapers.

The daily newspapers sometimes give curiously inaccurate accounts of cases coming before the Courts. We believe this is not peculiar to our own country. Indeed we know that in all countries haste is necessary in collecting and preparing for publication items of news for the daily press, and where there is haste, there cannot always be accuracy. We cannot, however, approve of the doctrine expounded by clever journalists that "the important thing is to *give* the news, not to give it accurately." Two years ago there was a very learned argument in the Court of Appeal for Ontario upon the question of the right of constables at polling booths to vote at Provincial elections, depending upon the construction of a statute. A Toronto newspaper on the day following the argument devoted some space to setting out the contentions of counsel on the doctrine of "be just and generous." It is supposed that the reporter had some

dim idea that these words described the attitude which the Legislature should adopt towards the constables. What was referred to by counsel was, of course, the well-known rule of construction, indicated by the words *ejusdem generis*. What we regard as a still more amusing blunder recently occurred in regard to a case in the same Court. The mistake arose from a similarity in names. *Attorney-General* v. *Newman*, reported below in 31 O. R. 340 and 20 Occ. N. 70, is a very important case about succession duty. *MacDougall* v. *Newman* is a less important case from a public standpoint. Both cases had been heard and were standing for judgment in the Court of Appeal before the 13th November last. On that day judgment was given allowing the appeal in the McDougall case, but the other case was not disposed of. It was not unnatural, perhaps, that the cases should be confounded by some careless news-gatherer, who reported that the appeal had been allowed in "the Scotten case," as *Attorney-General* v. *Newman* was called, and thus it was announced in large letters in an evening paper and telegraphed all over Canada that the Chancellor's judgment had been reversed by the Court of Appeal, and the Province had lost a large amount of succession duty. Everybody believed it, of course, although no reference to the case was to be found in the regular law reports of the morning papers, which, nevertheless, copied it as "news" without reserve. The defendants, who lived in Michigan (the estate being that of a foreigner), telegraphed to their solicitor here asking why (in Hades) he did not advise them of the judgment in their favour, as it was in all the the Detroit papers. Lawyers not in the case believed it and commented upon the result. One learned gentleman said he would like to see the grounds of the decision and would take an early opportunity of doing so; he was surprised at the result, but he never doubted the fact. This discussion was on the 14th November. On the 15th one of the Toronto papers gravely announced that the Attorney-General was dissatisfied with the judgment (a judgment which was not yet given!), had already given notice of appeal to the Supreme Court of Canada, and was prepared, if necessary, to carry the case to the foot of the Throne!

Lawyers' Wills.

Serjeant Maynard, who flourished as a "black-letter lawyer" in the days of William III., is said to have deliberately worded his will in ambiguous terms, so that several fine legal questions which had disturbed him in his lifetime might be decided in Court after he was dead. This is a disinterested motive which has certainly not guided Judges in the framing of their wills. The only occupant of the Bench whose testamentary wishes have been the immediate subject of litigation is Lord St. Leonards, and his will occasioned a famous probate suit, not because of any obscurity in its phraseology, but because of its mysterious disappearance from the box in which he was known to have placed it. The wills of most Judges have been distinguished for their brevity. Lord Mansfield made a disposition of his worldly goods on half a sheet of note-paper—an economy of labour and space all the more remarkable because he disposed of property of the value of half a million of pounds. Sir James Stephen, with characteristic conciseness, expressed his testamentary wishes in these simple words, "I give all my property to my wife, whom I appoint sole executrix." Almost equally brief was the will of Lord Russell of Killowen, by which he disposed of property to the value of £150,000. In striking contrast to the shortness and directness of these Judges' wills are the prolixity and rhetoric of the Earl of Dorset, who enjoyed a large measure of judicial fame in the seventeenth century. In making a very simple gift to his "most virtuous, faithful, and dearly-beloved wife," he took occasion to remark that he did not intend it to be regarded as "any recompense of her rare and reverent virtues of charity, modesty, fidelity, humility, secrecy, and wisdom, which he honoured, loved, and esteemed above all the transitory wealth and treasure of this world, and which therefore by no price of earthly riches could be valued, recompensed, or requited," but he desired it to be accepted as "a true token and testimony of his unspeakable love, affection, estimation, and reverence." Such manifestations of personal feeling, in which testators of all degrees were once accustomed to indulge, have now disappeared from wills, and it would seem

that no testators set a better example of conciseness than occupants of the Bench. (*The Law Journal*, 10th Nov.)

Appointments to the English Bench.

Since our last issue news has come of the promotion of Mr. Justice Stirling from the Chancery Division to the Court of Appeal, and of the appointment of Mr. Matthew Ingle Joyce as a Judge of the Chancery Division.

Lord Justice Stirling is the eldest son of a Presbyterian minister, and was born at Aberdeen in 1836, educated at the Grammar School and University of his native town, and at Trinity College, Cambridge, where he was Senior Wrangler in 1860. He was called to the Bar at Lincoln's Inn in 1862, and served for some time as a reporter on the staff of the Incorporated Council of Law Reporting. Appointed Junior Equity Counsel to the Treasury in 1881, he became a Judge of the Chancery Division in 1886.

Mr. Justice Ingle Joyce succeeded Sir James Stirling as Junior Counsel to the Treasury nearly fifteen years ago. He is one of four Judges now on the Bench who have been promoted from this position. Born in 1839, the fourth son of Mr. John Hall Joyce, of Brackfordby, Leicestershire, he was Eighth Wrangler at Cambridge in 1862, and a fellow of Caius from 1862 to 1875. He was called to the Bar at Lincoln's Inn in 1865, and acted as secretary to the late Vice-Chancellor Hall from 1872 to 1875. He became a member of the Bar Committee upon its formation in 1883, and was made a Bencher of his Inn in 1886.

Recent American Decisions.

Bailment.—The negligence of a gratuitous bailee of a mule while using the animal for the very purpose for which it was lent is held, in Illinois Central R. Co. v. Sims (Miss.), 49 L. R. A. 322, to be imputable to the owner so as to prevent his recovery against a third person whose negligence, combined with that of the bailee, caused the mule's death.

Banks.—The liability of bank directors for deposits received after they knew the bank to be insolvent or in failing circumstances is held, in Utley v. Hill (Mo.), 49 L. R.

A. 323, not to extend to deposits received when they actually believed it to be solvent, merely because they neglected to investigate or keep posted as to its affairs. The case also holds that false statements in a report to the state department would not make the directors liable to a common-law action for deceit in favour of one who deposited in reliance on the report, if the statements were made in good faith, believing them to be true.

Discrimination against Women.—A municipal ordinance making it a misdemeanour for a woman to go into any building where liquor is sold, or to stand within 50 feet of such building, is held, in Gastineau v. Com. (Ky.), 49 L. R. A. 111, to be void as an unnecessary interference with individual liberty. In a note to this case there is a review of the decisions on the constitutionality of discrimination against women in police regulations.

An ordinance making it unlawful for any person to associate, escort, converse, or loiter with any female known as a common prostitute, either by day or by night, upon any of the streets or alleys of a city, except her husband, father, brother, or other male relative, is held, in Hechinger v. Maysville (Ky.), 49 L. R. A. 114, to be an unconstitutional interference with personal freedom, since any person should be allowed to converse with her long enough to transact any necessary and legitimate business. It is also held that there is no reason for exempting any other male relative than the husband or brother, or for failing to give her mother or sister the same privilege allowed to the father or brother.

Evidence.—The presumption against suicide is held, in Standard Life & Acc. Ins. Co. v. Thornton (C. C. App. 6th C.), 49 L. R. A. 116, to be decisive of the case until overcome by testimony, where a passenger on a sleeping car disappeared from it in the night, and the next morning was found dead upon the track between the rails, with his overcoat on, under circumstances which excluded every hypothesis except suicide or accident.

An admission of contributory negligence made by an injured person who subsequently dies from his injuries is held, in Georgia R. & B. Co. v. Fitzgerold (Ga.), 49 L. R. A. 175,

to be admissible in evidence for the defendant on the trial of an action brought by the widow of the deceased for damages on account of his death.

Exemption from Taxation.—A charity confined exclusively to the members of the Masonic order and their families, or to the widows and children of deceased members, is denied, in Newport v. Masonic Temple Asso. (Ky.), 49 L. R. A. 252, exemption from taxation as a "purely public charity."

Master and Servant.—A teamster of experience who proceeds to work with short lines after complaining of their insufficiency, without receiving any promise to remedy their defects, and continues to use them for nine months, is held, in Limberg v. Glenwood Lumber Co. (Cal.), 49 L. R. A. 33, to assume thereby the risk attendant on the use of such lines. The authorities on the contributory negligence in entering or remaining in an employment are collected in the annotation to this case.

Railway.—A dangerous practice of mail agents, of throwing the mail from a moving train so as to endanger persons on the railroad premises, is held, in Shaw v. Chicago & G. T. R. Co. (Mich.), 49 L. R. A. 308, to make the railroad company liable to an intending passenger who was on the railroad platform, and who was injured by a mail bag thrown against him, if the carrier had knowledge of the dangerous practice and had allowed it to continue.

A parent entering a railroad train with a child *non sui juris*, but old enough to be required to pay fare, is held, in Braun v. Northern Pac. R. Co. (Minn.), 49 L. R. A. 319, to be under an implied contract to pay the child's fare, and, on refusal to do so, liable to be expelled from the train with the child, even though the parent offers to pay his own fare, or on refunding it to him if he has paid it.

BOOK REVIEWS.

Ewart on Estoppel. An Exposition of the Principles of Estoppel by Misrepresentation. By John S. Ewart, Q.C., of Winnipeg, Manitoba. Toronto: The Carswell Company, Limited. (1900).

This is the most noticeable Canadian law book which has been published for a long time, and it is doubtful if any Canadian law book has ever had as much sweat of the brain expended upon it as has been spent upon this book. It is published simultaneously in London, Chicago, and Toronto, under the international copyright law, and it is to be hoped that the book will meet with such financial success as will compensate its author for the long years of painstaking work which he has spent upon it.

It is confined to estoppel by misrepresentation, and, therefore, does not deal with estoppel by record or estoppel by deed.

It divides estoppel by misrepresentation into two classes, (1) estoppel by personal misrepresentation, (2) estoppel by assisted misrepresentation. The second class consists of cases falling under what is usually known as estoppel by negligence, and these cases are based upon the doctrine that where one of two innocent persons must suffer by reason of the wrongful act or default of some third person, that one must suffer whose own wrongful act or default enabled the third person to do the wrong. There does not appear to be any good reason for abandoing the term estoppel by negligence and replacing it by the term assisted misrepresentation. Our author cites the works of Prof. Bigelow and Mr. Cababé on Estoppel, as showing that those authors were unable to cite a case of estoppel by negligence. Our author apparently agrees that such a case is a *rara avis,* but he thinks that if you call it estoppel by assisted misrepresentation you can find then plenty of such cases, and he gives us a very useful table of cases (pp. 279-282) where there was a struggle between mortgagees for priority, and the question of priority was determined by reference to the question

whether there had or had not been a negligent parting with or a negligent failure to obtain the title deeds of the mortgaged property.

These are said to be cases of assisted misrepresentation, because one person has by his carelessness assisted another person to make a misrepresentation which has caused damage to a third person. Here is a typical case of the sort:—The estoppel denier is an equitable mortgagee by memorandum, who has failed to obtain possession of or make inquiry for the title deeds. The estoppel asserter is a subsequent equitable mortgagee of the same property by deposit of the title deeds for value and without notice. We venture to think that any old-fashioned lawyer would call this a case of estoppel by negligence based upon the principle above stated, which is the general principle underlying the doctrine of equitable estoppel.

Chapter 16 contains a most instructive discussion of the common law action of deceit and of the relations between deceit and estoppel.

The latter part of chapter 11 contains the best exposition that is to be found of the law relating to a purchaser for value without notice. It is there pointed out that the defence of purchaser for value without notice as formerly allowed by the Court of Chancery was completely abolished by the fusion of the common law Courts and the Court of Chancery under the Judicature Act, and that at the present time the fact of either a plaintiff or a defendant being a purchaser for value without notice will not, standing by itself, either give a good cause of action or afford a good ground of defence, but it may be a component and very valuable part of such cause of action or ground of defence, and when coupled with the further fact that such purchaser holds the legal estate, or that he can assert an estoppel against his opponent, it will afford him a complete cause of action or ground of defence.

Our author bases the whole of the law relating to negotiable paper not upon any peculiarity of the law merchant, but upon the doctrine of estoppel. He says in effect that negotiable paper, whether it be a promisssory note or a company debenture, is, in form, a promise to pay any person

who shall become the bearer or who shall obtain the order of the original payee, and therefore, that the lawful holder can at any time say to the maker: "This is an original and direct contrast between you and me whereby you promised to pay me, and you are by the form of your own contract estopped from setting up against me any equities in your favour which may have attached to this contract while this paper was in the hands of some other holder." The only weakness of this view appears to be its inadequacy to account for the state of the law relating to overdue commercial paper. This view, on the other hand, does afford a satisfactory basis for the modern doctrine as to the negotiability of bonds, debentures, scrip, etc., when made payable to bearer or to order.

The commonly accepted view of Judges and text writers is that "an important difference is to be noted between a 'general' and a 'particular' agency; for, if a particular agent exceeds his authority, his principal is not bound by what he does; whereas if a general agent exceeds his authority, his principal is bound, provided what he does is in the ordinary and usual scope of the business which he is deputed to transact."

Mr. Ewart denies that there is any such difference, and he relies upon the doctrine of estoppel as elucidating the whole of the law upon the question whether the principal is, or is not, bound by the act of his agent.

It is noticeable throughout the book that our author is somewhat inclined to refine upon refinements. He is severely logical, and he inspects every doctrine with a microscope. He has a hobby for inventing new names under which he disguises our old legal friends. For example, he prefers to speak of carelessness instead of negligence as being essential to some kinds of estoppel. The estoppel asserter and the estoppel denier are convenient terms used by our author, but we venture to think that "Falsavert" will not be adopted into the legal family of words.

He is strong on classification. He can take almost any doctrine and divide it into sub-heads, and then re-divide these heads and sub-divide the re-division.

He has the courage of his convictions, and is not at all afraid to differ in opinion from a text writer, a Judge, or a bench of Judges.

A convenient method adopted in the book is that of summing up the effect of a chapter at the end thereof.

The book is well printed, but the appearance of the page is spoiled by too narrow a margin.

A. H. M.

International Law in South Africa by T. Baty, Barrister-at-law. London: Stevens and Haynes. 1900.

The studies comprehended in this little volume of something more than one hundred pages were originally delivered delivered as lectures at Oxford, and the book was published as lately as October last. It is therefore a very recent contribution to the discussion of a subject of surpassing interest at the present time.

In the first chapter Mr. Baty treats of "Contraband for Neutral Ports" and vigorously combats the statement that Lorenzo Marquez, because of its alleged position "as the natural port of the Transvaal," which has no seaports of its own, is not to be regarded as a neutral harbour, either upon the principle of the American Civil War cases, such as The Springbok, Wallace, V. 1, in which the doctrine of "continuous voyages" is enunciated, or upon any other principle. The author thinks that class of cases inapplicable, and also contends that the principle of them has not been approved or adopted so as to make an innovation upon the old rule. "The conclusion," he says, "is . . . that contraband, to be confiscable as such, must be seized on board a vessel which is going to an enemy port, according to the ancient practice. To seize it because it is supposed to be eventually intended for the enemy is a dangerous extension, and one which is moreover opposed to the current of progress; which has set strongly in the direction of doing away with restrictions on contraband trade altogether."

Upon the difficult question of the suzerainty of Britain over the late Boer Republics, which is the subject of the

second chapter, Mr. Baty has not much to say that is new. He examines the authorities, declares that the only satisfactory way of looking at the matter is to treat the sovereignty as split up between the governments of the Republic and the United Kingdom, and, with some hesitation, that it is safest to recognize the possibility of war between a suzerain and its vassal—at all events where it is waged for the safeguarding of the vassal's rights—and in such a case the people of that State cannot be treated as rebels.

The other chapters are intituled, "Passage of Troops over Neutral Territory," "Conduct of Warfare," "Annexation," and "Limited Companies in the War." An appendix contains a comparative summary of the Transvaal conventions.

The book treats, it may be seen, nearly altogether of controverted matters, but the author, while a strong partisan, is fair in his methods, and, being the master of a clear-cut style and practised in the use of humour and paradox, he often allures even when he does not convince.

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CANADIAN LAW TIMES

OCCASIONAL NOTES.

Judicial Committee of Privy Council.

[9TH MARCH, 1898.

MOLSONS BANK v. COOPER.

Collateral security—Crediting proceeds—Suspense account—Banks.

A bank gave a customer "a line of credit to $150,000, to be secured by collections deposited:"—

Held, that the bank was bound to credit the customer with the payments made from time to time to the bank on collateral notes deposited with the bank by the customer in accordance with the terms of the memorandum, and could not hold the payments in a suspense account until the maturity of the customer's own paper given to the bank to cover the line of credit, and take judgment against the customer for the full amount of that paper.

Judgment of the Supreme Court of Canada, 26 S. C. R. affirmed.

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Judgment of the Supreme Court of Canada, 26 S. C. R. 11, affirmed.

Shepley, Q.C., and *W. E. Hume-Williams*, for the appellants.

The respondents were not represented.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[15TH MARCH, 1898.

HILLIKER v. KNIGHTS OF THE MACCABEES.

Benevolent society—Non-payment of dues—Forfeiture of benefits—Life insurance.

Upon the construction of the special rules of a benevolent society BURTON, C. J. O., and MACLENNAN, J. A., held that a member had, in consequence of non-payment of dues by him, ceased to be a member and had forfeited his right to benefits, while OSLER and MOSS, JJ.A., took the contrary view.

In the result, therefore, the judgment of BOYD, C., in the plaintiff's favour, was affirmed. But see 29 S. C. R. 397.

J. A. Paterson, for the appellants.

F. R. Ball, Q.C., and *R. N. Ball,* for the respondent.

HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., 2ND DECEMBER, 1899.

REGINA v. LANGLEY.

Municipal corporations—By-laws—Transient traders—Sale—Trading stamps—Conviction—R. S. O. c. 223, s. 583, s.-ss. 30, 31.

The defendant entered into an arrangement with various retail merchants by which each of them was to receive from him a quantity of "trading stamps," the property in which, however, was to remain in him, and to pay him fifty cents for every hundred of such stamps received, and to give one of these stamps to each customer who purchased for cash ten

cents worth of goods, while he on his part was to advertize them in certain directories to be distributed by him, and also in newspapers. A blank space was left in these directories for pasting in such stamps, and every customer of any of the merchants who brought to the defendant one of the directories with 990 stamps pasted in it, was entitled to receive in exchange any one he might select of an assortment of goods kept in stock by the defendant. Apart from this, these goods were not for sale.

Held, that these transactions did not constitute a "selling or offering for sale" by the defendant within the meaning of a municipal by-law passed under R. S. O. c. 223, s. 583, s.-ss. 30, 31, the stamps delivered to the defendant in exchange for his goods being of no value to him.

The essence of sale is transfer of property from one person to another for money or money's worth.

J. B. Clarke, Q.C., for the defendant.

Aylesworth, Q.C., for the prosecutor.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 5TH DECEMBER, 1899.

REGINA v. T. EATON CO.

Criminal law—False trade description—Application of—Evidence.

The defendants by an advertisement in a newspaper described certain tea-sets as "quadruple plate," stating that the regular price thereof was $12 a set, but that they would be sold for $6. The purchaser of one of the sets, before making his purchase, inquired, and was informed, that it was one of the tea-sets advertised, and that the advertisement could be relied upon.

Held, ROSE, J., dissenting, that the use of the words "quadruple plate" in the advertisement was an application of a false trade description, in that such goods could not properly be described as such; and that there was evidence to show that the advertisement applied to these goods.

J. R. Cartwright, Q.C., for the Crown.

J. J. Maclaren, Q.C., for the defendants.

REGINA v. IRELAND.

Liquor License Act—Unlicensed premises—Search for liquor—Right of inspector to take stranger with him—Necessity for warrant—Proof of liquor being sold—R. S. O. c. 245, ss. 130, 131.

The right of entry under s. 130 of the Liquor License Act, R. S. O. c. 245, into any inn, tavern, &c., to make search for liquor, is limited to the persons named therein, namely, "any officer, police constable, or inspector;" and it is only under s. 131, on the procuring a warrant as therein provided, that the officer, &c., can take with him a person not being one of those named.

Where, therefore, a license inspector, in proceeding to search the defendant's premises for liquor, took with him a person, not being one of those so named, without having procured a warrant, his act was illegal, and the defendant justified in resisting it; and a conviction for obstructing the inspector in the discharge of his duty was quashed.

The defendant's premises had been licensed as a tavern, but the license had expired, and the only evidence of liquor being sold or reputed to be sold therein, was the statement of the inspector that the defendant's bar-room remained the same as before, i. e., before the expiry of his license.

Per MEREDITH, C. J.—This was not sufficient to satisfy the requirements of the section.

Per MEREDITH, C. J., also, that, under the circumstances of this case, an objection that reasonable grounds had not been shewn for suspecting that some violation of the Act was taking place or was about to take place, was not tenable.

Haverson, for the defendant.

Langton, Q.C., for the prosecutor.

GOLDIE AND McCULLOCH CO. v. HARPER.

Sale of goods—Conditional sale—Possession of vendee—Non-payment of price—Loss of goods.

In an action upon a promissory note given by the defendant for the price of a machine sold by the plaintiffs to the defendant upon a conditional sale, under which the pro-

perty in the machine was not to pass until payment, it appeared that the machine had been accidentally destroyed by fire while in the defendant's possession before payment in full was made.

Held, that a substantial interest in the machine had passed to the purchaser, and he was liable for the price.

Hesselbacher v. *Ballantyne,* 28 O. R. 182, 17 Occ. N. 7, approved.

Judgment of the County Court of York affirmed.

W. Nesbitt, Q.C., and *H. E. Rose,* for the plaintiffs.

Aylesworth, Q.C., for the defendant.

[MEREDITH, C.J., ROSE, J., 5TH DECEMBER, 1899.

STIRTON v. GUMMER.

Libel—Evidence—Admissibility—Previous writings—Provocation—Mitigation of damages—Meaning of words.

In libel for two articles which were printed in the defendant's newspaper reflecting upon the character and conduct of the plaintiff:—

Held, that an article in another newspaper, published before the first of the alleged libels, purporting to be an account of an interview with the plaintiff in which he made an attack upon the defendant's newspaper by its name, and a letter signed by the plaintiff, published in two newspapers before the second of the alleged libels, in which the defendant's newspaper and the editor thereof—not the defendant himself—were referred to in abusive language, were admissible in evidence upon the part of the defendant, in mitigation of damages.

Percy v. *Glasco,* 22 C. P. 521, followed.

Held, also, per ROSE, J., that editorial articles which appeared on the same day in the newspapers which published the plaintiff's letter, referring to it and to the defendant's newspaper, were admissible too, as furnishing provocation for the second of the alleged libels; MEREDITH, C. J., *contra.*

In the first of the alleged libels one of the statements made about the plaintiff was "that during an election campaign the party managers had to lock him up to keep him from disgracing them on the stump."

Held, that evidence was admissible on the part of the defendant to explain the meaning of the words "lock him up."

Riddell, Q.C., and *H. Guthrie,* for the plaintiff.

King, Q.C., for the defendant.

REGINA v. SMITH.

Municipal corporations—By-law—Regulation of hawkers—R. S. O. c. 223. s. 583, s-s. 14—Proviso—Negative exception—Conviction—Quashing—Costs.

A by-law of a county council recited the provisions of s.-s. 14 of s. 583 of the Municipal Act, R. S. O. c. 223, and that it was expedient to enact a by-law for the purpose mentioned in the sub-section; it then went on to enact "that no person shall exercise the calling of a hawker, pedlar, or petty chapman in the county without a license obtained as in this by-law provided;" but the by-law contained no such exception as is mentioned in the proviso to s.-s. 14, in favour of the manufacturer or producer and his servants.

Held, that the by-law was *ultra vires* the council, and a conviction under it was bad.

Held, also, following *Regina* v. *McFarlane,* 17 Occ. N. 29, that the conviction was bad because it did not negative the exception contained in the proviso, and there was no power to amend it, because the evidence did not shew whether or not defendant's acts came within it.

The conviction was therefore quashed, but costs were not given against the informant.

Watson, Q.C., for the defendant.

No one appeared for the informant.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 11TH DECEMBER, 1899.

REGINA v. URQUHART.

Summary conviction—Lord's Day Act—Druggist—Selling "ice cream soda" —Exception in statute—Drugs and medicines—Evidence—Finding of magistrate—Certiorari—Review.

Motion by the defendants for leave to file the return to a certiorari and for a rule *nisi* to quash the conviction of the defendant by the police magistrate for the city of Toronto for an offence against the Lord's Day Act.

The defendant was a chemist and druggist carrying on business in the city of Toronto. The evidence before the magistrate shewed that on Sunday the 25th June, 1899, two policemen bought "ice cream soda" at the defendant's shop and paid 20 cents therefor. One of the policemen swore that he was not ill, and did not get the stuff for medicine, but he also said that nothing was said at the time as to whether either he or the other policeman was ill or not. Evidence was given by physicians to shew that both ice cream and soda water were used as medicines.

The magistrate found upon the evidence that soda water and ice cream were sometimes sold as medicines, and stated that, in his opinion, the sale of these articles mentioned in the evidence was not made as a sale of medicine, although nothing was said by either party on the subject.

The conviction was that "William J. Urquhart, being a tradesman carrying on business at the said city of Toronto, on the 25th day of June, 1899, being the Lord's Day, at the city of Toronto aforesaid, at his shop, number 395 in Yonge street, in said city, unlawfully did sell and publicly shew forth and expose and offer for sale certain goods, chattels, and other personal property, thereby doing and exercising the worldly labour, business, and work of his ordinary calling, by selling, amongst other goods, two glasses of ice cream soda (the same not being the conveying of travellers or Her Majesty's mail by land or by water, nor the selling of drugs and medicines, nor other works of necessity not works of charity) contrary to

the form of the statute in such case made and provided." The defendant was adjudged to pay a fine of $1 and $2.35 for costs.

Wallace Nesbitt, Q.C., for the defendant, contended that the conviction was bad, because the magistrate had expressly stated that the articles were sometimes sold as medicines, and that there was no evidence that they were not so sold in this case—the result of which was that there was no evidence to support the finding that there was not a sale of drugs or medicines within the exception in the statute. He also relied on *Regina* v. *Howarth*, 33 U. C. R. 537.

THE COURT stated that *Regina* v. *Howarth* had not been followed in this Court for many years, during which it had been frequently laid down, and was thoroughly well established, that the finding of the magistrate upon a question of fact within his jurisdiction would not be reviewed by the Court upon *certiorari*, but the defendant's remedy, if any, was by appeal

Rule *nisi* refused.

[ARMOUR, C.J., FALCONBRIDGE, J., 27TH DECEMBER, 1899.

FAWKES v. SWAYZIE.

County Court appeal—Setting down—Time—Computation—"Judgment, order, or decision"—Settlement—Power of Judge to resettle.

The County Courts Act, R. S. O. c. 55, by s. 57 provides that "the appeal shall be set down for argument at the first sittings of a Divisional Court of the High Court of Justice which commences after the expiration of one month from the judgment, order, or decision complained of."

Held, that the month begins to run from the date of the judicial opinion or decision, oral or written, pronounced or delivered, and the judgment or order founded upon it must be referred to that date.

If such opinion or decision is not pronounced or delivered in open Court, it cannot be said to be pronounced or delivered until the parties are notified of it.

Quaere, whether after a judgment has been settled and entered, the Judge has power to resettle it.

W. Nesbitt, Q.C., for the plaintiffs.

Shepley, Q.C., for the defendant.

[Boyd, C., 28th October, 1899.

FANE v. LANGLEY,

LAVINDER v. LANGLEY.

Company—Assignment for benefit of creditors—President and vice-president—Wages—Priority.

Claims for arrears of salary, made by persons occupying the positions of president and vice-president of a company, such salary being made payable under resolutions duly passed therefor, are valid; and upon the liquidation of the company are payable in priority to the claims of the general body of creditors.

Shepley, Q.C., and *F. C. Cooke*, for the plaintiffs.

W. H. Blake, for the defendant.

[30th November, 1899.

WARD v. TOWN OF WELLAND.

Municipal corporations—Money by-laws—Recital of existing debt—Invalidity—R. S. O. c. 223, ss. 384, 685 (2.)

The Municipal Act, R. S. O. c. 223, by s. 685 (2), after declaring that debentures issued under local improvement by-laws of a municipality, on the security of special assessments therefor, form no part of the general debt of such municipality, provides that it shall not be necessary to recite the amount of such local improvement debt in any by-law for borrowing money on the credit of the municipality, but that it shall be sufficient to state in any such by-law that the

amount of the general debt of the municipality as therein set forth, pursuant to s. 384 (10), is exclusive of local improvement debts secured by special Acts, rates, or assessments.

Held, that this concluding clause is directory only, and the omission to observe it will not alone invalidate the by-law.

J. Bicknell, for the plantiff.

German, Q.C., for the defendants.

[2ND DECEMBER, 1899.

ONTARIO MINING CO. v. SEYBOLD.

Indians and lands reserved for Indians—Surrender of Indian lands — Constitutional law—Crown title—Precious metals—B. N. A. Act, s. 109.

By the North-West Angle Treaty, No. 3, whereby certain Indian territory was surrendered to the Dominion Government in 1873, certain lesser reserves in the surrendered lands were to be defined and set aside, and thereafter to be administered and dealt with by the Dominion for the benefit of the Indians making the surrender.

It was also provided that such lesser reserves might be sold, leased, or otherwise disposed of by the Dominion for the use of the Indians, their consent being first obtained.

One of such lesser reserves so set apart was known as 38 B, and in 1886 some 600 acres of it were surrendered to the Queen under the Dominion Indian Act of 1880, in trust to sell the same upon such terms as the Dominion Government might deem most conducive to the welfare of the Indians, and to hold the proceeds in trust for the Indians.

Part of this 600 acres, being the lands in question, the Dominion Government patented to the plaintiffs. But the defendants asserted title in fee simple to the same land by virtue of a provincial patent granted in 1899.

Moreover, in negotiating the treaty in 1873 the Dominion Commissioners represented to the Indians that they would be entitled to the benefit of any minerals that might be discovered on any of the lesser reserves to be thereafter delimited.

Held, that the effect of the surrender in 1886 was to leave the sole proprietary right and present ownership in the Crown as represented by the Ontario Government, and from it alone could an estate in fee simple be obtained; and, although the title of the Crown to the precious metals is distinct from its title to the land, and rests on the royal prerogative, still the beneficial interest therein being vested in the province of Canada at Confederation, by virtue of 9 V. c. 114, passed by s. 109 of the B. N. A. Act to Ontario. With these royal mines the Indians had no concern; nor could the Dominion Government make any valid stipulation with them in 1873, which could affect the rights of Ontario.

The action dismissed with costs and the Dominion patent held invalid.

Robinson, Q.C., and *J. Bicknell*, for the plaintiffs.

Osler, Q.C., *L. G. McCarthy*, and *A. M. Stewart*, for the defendant Osler.

Shepley, Q.C., for the Minister of Justice for Canada.

Biggs, Q.C., for the defendant Johnston.

W. D. McPherson, for the defendant Seybold.

J. M. Clark, Q.C., and *R. U. Macpherson*, for the other defendants.

[MEREDITH, C.J., 18TH DECEMBER, 1899.

HORSMAN v. CITY OF TORONTO.

Assessment and taxes—Arrears of taxes—Goods on premises "purchased" from owner—R. S. O. c. 224, s. 135, s.-s. 4 (b).

Held, that goods purchased from a mortgage of the owner or person assessed, were not goods title whereof "is claimed by purchase, gift, transfer, or assignment, from the owner or person assessed" within the meaning of s. 135, s.-s. 4 (*b*), of the Assessment Act, R. S. O. c. 224, and could not be levied on for taxes in arrear in respect to the premises owned by the mortgagor of the goods.

Brewster, for the plaintiff.

Fullerton, Q.C., and *W. C. Chisholm*, for the defendants.

In re MEDLAND AND CITY OF TORONTO.

Municipal corporations—Local improvements—Block pavement—Liability to repair—Reconstruction—R. S. O. c. 223, s. 666—62 V., sess. 2, c. 26, s. 41.

A city corporation having, by by-law passed in 1888, adopted the local improvement system, a pavement was constructed as a local improvement in 1891, composed of cedar blocks, circular in form and seven inches in length, laid upon a bed of clean gravel, the roadway having been first graded to the proper level, with wooden curbing on each side of it. The by-law for levying the assessments stated that ten years was the "lifetime" of the pavement.

Sections 664 and 665 of the Municipal Act, R. S. O. c. 223, authorize the passing of by-laws providing for the construction of local improvements and the making of assessments therefor.

Section 666 provides that "nothing contained in the two preceding sections shall be construed to apply to any work of ordinary repair or maintenance, and all works or improvements constructed under the said sections shall thereafter be kept in a good and sufficient state of repair at the expense of the * * city * * generally."

Held, that what the legislature contemplated was that the initial cost of the construction of the local work or improvement should be borne by the owners of the property benefitted by it, but that they should not be responsible for the keeping of it in repair, that duty being cast upon the municipality generally, and that when it should become necessary to reconstruct the work or improvement, the cost of doing so should be defrayed by the owners of the property benefitted by the work of reconstruction.

Held, also, that this duty to repair is imposed upon the municipality for the benefit of those at whose expense the work or improvement has been made; and is not to be confounded with the general duty to repair, which is one towards the public.

Held, also, that this duty ends when it becomes necessary to reconstruct the work or improvement, and that whenever

it is in such a condition that practical men would say of it that it is worn out and not worth repairing, no order for repair can be made under the amendment to s. 666 contained in s. 41 of 62 V., sess. 2, c. 26.

Semble, that if the dilapidated condition of the pavement were due to the municipality having in the past neglected the duty to repair, the result would be different, the amending Act of 1899 being applicable to cases where the breach took place before it was passed.

F. A. Hilton and *S. B. Woods*, for the applicant.

Fullerton, Q.C., for the corporation of the city of Toronto.

MONTGOMERY v. RUPPERSBURG.

Specific performance—Lands abroad—Foreign plaintiff—Jurisdiction.

The plaintiff, a resident of Buffalo, agreed in writing with the defendant to exchange certain lands situate in Buffalo for land of the defendant situate in Ontario; and now brought this action for a specific performance of this contract.

Held, that the plaintiff having brought his action in this Court, and thereby submitted to its jurisdiction, the Court had jurisdiction to decree specific performance.

H. H. Collier and *Morwood*, for the plaintiff.

L. C. Raymond, for the defendant.

[16TH DECEMBER, 1899.

In re BURNETT AND TOWN OF DURHAM.

Arbitration and award—Motion to set aside award—Time—Publication—R.S.O. c. 223, s. 465—Arbitrator—Omission to take oath—R.S.O. c. 223, s. 458—Municipal corporations—Lowering grade of highway—Retaining wall—Maintenance of—Power to award—Injury to land—Interference with access—Compensation.

The six weeks allowed by s. 465 of the Municipal Act, R. S. O. c. 223, for an application to set aside an award, run from the publication *to the parties* of the award.

The failure of the arbitrator to take the oath required by s. 458 of the same Act is fatal to his award; but when an award

is moved against on the ground of such failure, it must be clearly shewn that the applicant was not aware of the omission until after the making of the award.

An arbitrator to whom is referred a claim for compensation for injury to land by reason of the lowering of the grade of the adjoining highway by the municipality, has no power to direct the municipality to maintain a retaining wall.

The arbitrator has power to include in his award compensation to the land-owner for injury to his land during the progress of the work by interference with the means of access thereto, and also the cost of work done to afford him such access.

Rowell, for the town corporation.

W. H. Blake, for the land-owner.

[FERGUSON, J., 10TH NOVEMBER, 1899.

LILLIE v. WILLIS.

Will—Devise over—Condition—Death—Estate in fee.

A testator devised all her real and personal estate to her son in fee and provided in case the son should die without issue previous to the death of her brother and sister, that they should take certain interests. The sister died in the lifetime of the son.

Held, that, as the event, the death of the son previous to the death of both the brother and sister, could not happen, the son took an estate in fee simple.

George Wilkie, for the plaintiffs.

[ROSE, J., 16TH DECEMBER, 1899.

McCUAIG v. CONMEE.

Injunction—Motion to dissolve—Necessity for.

Where an interim injunction is granted to a day certain, and a motion to continue is necessary to extend it beyond such day, a motion to dissolve is improper, except where it is desired to get rid of the interim order before the day named.

J. H. Moss, for the plaintiff.

Rowell and *Corley*, for the defendants.

IN CHAMBERS.

[ROSE, J., 14TH DECEMBER, 1899.

HARRIS v. BANK OF BRITISH NORTH AMERICA.

Interpleader—Summary application—Rule 1103 (a)—Money in bank—Adverse claims—Foreign claimants—Foreign action—Jurisdiction.

Appeal by the defendants from an order of the Master in Chambers dismissing a motion under Rule 1103 (*a*) for an interpleader order in respect of moneys in the hands of the defendants which were claimed by the plaintiff and also by the Pioneer Trading Corporation of the Klondike (Limited), a corporation having their head office in London, England. This company had not sued, and did not intend to sue the defendants in Ontario, but had brought an action in London, England. They objected to any order being made for the purpose of compelling them to litigate their rights in Ontario. A deposit of deeds with the defendants was made at Dawson City, with a direction as to the disposition of them; the money in question was deposited in London, England; and none of the parties had any dealings with each other in the Province. The defendants, however, were sued here by the plaintiff.

Held, that it was not convenient or proper to make an interpleader order; and *semble*, there was no jurisdiction to make one.

In re Confederation Life Association and Cordingly, 19 P. R. 16, *Credits Gerundeuse* v. *Van Weede*, 12 Q. B. D. 171, and *Re Benfield and Stevens*, 17 P. R. 339, referred to.

Appeal dismissed with costs.

J. Greer, for the defendants.

D. O. Cameron, for the plaintiff.

W. H. Blake, for the other claimants.

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[TOWNSHEND, J., 2ND DECEMBER, 1899.

HAMILTON v McINTOSH.

Pleading—Statement of defence—Striking out—Truth or falsity—Affidavit.

Application to strike out a paragraph of the statement of defence, setting up fraudulent circumstances in the taking of a promissory note.

T. R. Robertson, for the plaintiff.

A. V. Pineo, for the defendants.

TOWNSHEND, J.—I am strongly of the opinion that the defence in this case is false, and will not be sustained at the trial, but, in view of the decisions in our Court, especially *Books* v. *Battin,* 30 N. S. Reps. 386, and *Holmes* v. *Taylor,* 31 N. S. Reps. 191, I have no course open to me except to refuse the present application. The defendant undertakes to swear to a defence, especially of fraudulent circumstances in the taking of the note. This being so, however much I discredit his statement, the case must go to trial.

In re BAKER.

Criminal law—Aiding deserter from Her Majesty's service—Conviction—Uncertainty—Penalty—Costs.

The prisoner was convicted under s. 73 (*b*) of the Criminal Code, which is as follows:—"Everyone is guilty of an indictable offence who * * * * conceals, receives, or assists any deserter from Her Majesty's military or naval service, knowing him to be such deserter." The penalty on

summary conviction is "not exceeding $200, and not less than $80 and costs," and in default of payment, imprisonment for any term not exceeding six months. The magistrate imposed a penalty of $100, and in default of payment four months' imprisonment.

Upon the return of a habeas corpus the conviction and warrant were attacked as bad, because of

(1) Uncertainty as to what offence committed, the conviction having followed literally the words of the Act, "conceal, receive, or assist."

(2) Not appropriating the penalty, but merely providing "that it be paid and applied according to law."

(3) Not awarding costs against the defendant.

Held, that the words of the Act do not each describe a separate offence, but are merely an amplification of language to cover all shades or description of the same kind of offence —that of giving aid to a deserter.

Regina v. *Gibson*, 29 O. R. 663, distinguished.

At any rate s. 907 of the Code would cure.

2. That the penalty must be disposed of under ss. 927 and 928 of the Code, and was properly directed "to be paid and applied according to law."

3. That it was not necessary to award costs against the defendant, the words of the statute meaning that $200 was the highest penalty, and "$80 and costs" the lowest penalty. The fine was fixed at $100 and no costs, and the magistrate acted within his discretion in not awarding costs.

Order for discharge refused.

W. R. M. Hartlen, for the Crown.

W. A. Henry, for the War Office.

J. J. Power, for the prisoner.

NEW BRUNSWICK.

In the Supreme Court.

[FULL COURT, 17TH NOVEMBER, 1899.

ANDERSON v. SHAW.

Costs—Set-off—County Court—Appeal—Forum.

This action was brought in the York County Court for alleged false imprisonment. The plaintiff made a motion to strike out the defendant's notice of defence, which was granted. The defendant appealed against the order to the Supreme Court, and the appeal was allowed with costs. Subsequently the plaintiff secured a judgment.

This was an application by the defendant for an order to set off his costs of appeal against the plaintiff's judgment.

Held, that the application should be to the County Court. Section 75 of 60 V. c. 28 provides, *inter alia*, that when the costs of an appeal are allowed the costs are to be certified to the Court below, and upon receipt of the certificate, the Court below shall proceed in accordance therewith.

Geo. W. Allen, Q.C., for the motion.

IN EQUITY.

[VANWART, J., 16TH DECEMBER, 1899.

CURTIS v. MUNICIPALITY OF CARLETON.

Parties—Municipal expenditure—Suit by ratepayer—Demurrer—Attorney-General.

This suit was brought by the plaintiff, a ratepayer in the county of Carleton, to restrain the county council of the defendant municipality from expending county funds in the erection of a new gaol building on lands not included in the locus authorized by statute as a site for a county gaol.

Held, on demurrer to the bill, that the plaintiff could not maintain the suit in his own name, as the bill did not allege any damage or invasion of any right peculiar to himself and not common to all other ratepayers, and that the suit should have been in the name of the Attorney-General on the relation of some person.

Leave given to convert the bill into an information by the Attorney-General by way of amendment.

Costs of demurrer to be costs to the defendant in any event.

D. McL. Vance, for the plaintiff.

Connell, Q.C., for the defendant.

AHERN v. AHERN.

Dower—Estate in fee—Undivided share—Commencement of right—Costs.

The plaintiff brought suit for dower, arrears of dower for six years before action, and costs of suit.

The defendant denied the right, asserting that:

(1) The deceased had only an estate for life, and not in fee.

(2) If the plaintiff was dowable, she was only entitled to dower in an undivided one-half of the premises.

(3) She was only entitled to dower from the commencement of the suit, as the deceased did not die seized.

(4) She was not entitled to costs of suit.

The first ground was decided in the plaintiff's favour: 1 N. B. Eq. 53.

Held, that the defendant was entitled to succeed on the second and third grounds; and no costs were allowed.

Connell, Q.C., for the plaintiff.

D. McL. Vance, for the defendant.

IN DIVORCE.

[VanWart, J., 22nd December, 1899.

BELL v. BELL.

Costs—Counsel fees.

Motion to review taxation of costs of the plaintiff, the wife, taxed as between solicitor and client, to be paid by the defendant, the husband.

The Registrar allowed retainer and other fees to counsel in addition to the proctor, who also acted as counsel.

Held, as the case was not one in which second counsel could be considered as reasonably necessary, that the items should be disallowed.

Hannington, Q.C., for the plaintiff.

Gregory, Q.C., for the defendant.

IN CHAMBERS.

[VanWart J., 5th December, 1899.

Ex parte DOHERTY.

Canada Temperance Act—Fourth conviction—Imprisonment—Release on bail—Re-arrest—Process—Discharge.

D. applied for an order, in the nature of habeas corpus, under ss. 5 and 6 of C. S. N. B. c. 42, for his discharge from prison, where he was in custody under the following circumstances. He was originally imprisoned under a warrant of two justices on a conviction for a fourth offence against the provisions of the second part of the Canada Temperance Act. He applied for an order for his discharge to McLeod, J., who referred the matter to the Court for advice, bailing the prisoner to appear on a day certain in term, to submit to whatever order the Court might make. The Court, by a majority of its members, advised McLeod, J., that D. was legally imprisoned and to refuse the application. D. appeared on the day and at the place mentioned in his recognizance

before McLEOD, J., sitting as the Court, who made an order recommitting D. to gaol, "there to remain until discharged according to the condition of the said warrant" (original warrant of justices) "and according to the condition of the recognizance and the course of the Court."

D. was by consent of counsel allowed to go at large from Saturday until Tuesday, on which day he surrendered himself to the gaoler, who refused to take or retain him. On the following day D. was arrested by a provincial constable on the order of the Court, without any process, and lodged in gaol.

Held, that the Judge had no power on the first application to bail D., as there were not any facts upon which the Judge had any doubts, the grounds of the application being matters of law, and there being no facts the truth or falsity of which were to be pronounced upon.

If the Judge could order the bailing of D., no order was made by the Court, as the matter was referred back to the Judge, and any order he made should have been under his hand. Assuming that the Judge was right in making the order as an order of the Court, D. being at large could not be arrested on the order without a process of the Court to enforce it.

The prisoner was discharged.

Pugsley, Q.C., for the applicant.

Phinney, Q.C., and *McCully*, for the prosecutor.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 29TH NOVEMBER, 1899.

BRENCHLEY v. McLEOD.

County court—Appeal from order allowing amendment at trial—Order made final in a certain event.

The plaintiff sued in the County Court of Winnipeg on a promissory note made by the defendant. The note was produced at the trial and was dated 19th November, 1892,

whereas the date of the note as given in the plaintiff's particulars of claim was 19th March, 1892.

The defendant's counsel asked for a nonsuit to be entered, whereupon the plaintiff's counsel asked for leave to amend.

The County Court Judge stated that, being satisfied that the defendant was in no way misled by the error in the date of the note, and considering the enlarged powers given to a Judge of the County Court by s. 330 of the County Courts Act, R. S. M. c. 33, he was of the opinion that the plaintiff should be allowed to amend his particulars of claim to correspond with the facts shown at the trial and as asked for by the plaintiff. At the same time he gave to the defendant the right to amend his dispute note, so as to set up any defence he might have to such amended claim, the same to be filed within fifteen days after notice given to the defendant's attorney of the judgment given, and in default thereof judgment would be signed for the plaintiff for the full amount of his claim with costs of Court only. The defendant appealed to the Court *in banc* against the judgment of the County Court Judge. When the appeal came on to be heard counsel for the plaintiff took the objection that the appeal was not properly before the Court; the appeal was stated to be from a "judgment or order" made on a certain day; he contended there was no judgment or order made on that day; it was not an appeal from a judgment at the trial.

Held, that this was not a mere direction in the course of the trial allowing an amendment, and trial subsequently proceeded with. Here there was to be no further trial if a dispute note were not put in, and if one should be put in, it would be another trial entirely. This was an order for a final disposition of the case in a certain event, and action in default would be that of the clerk properly taken if the order stood, from which there could be no appeal. The appeal should be heard. It was not merely an interlocutory order allowing an amendment.

The Court subsequently dismissed the appeal with costs.

Phippen, for the plaintiff.

Bonnar, for the defendant.

[13TH DECEMBER, 1899.

In re DUPAS.

Certiorari — Application for —Forum — Conviction under Masters and Servants' Act.

Motion for a rule *nisi* for a writ of *certiorari*.

Peter Dupas was, on the 13th November, 1899, convicted, under the Master and Servants' Act, R. S. M. c. 96, before a justice of the peace, for refusing to pay G. Gregoire $18 due to him for wages, and ordered to pay that sum and $4.45 costs.

On the motion coming on to be heard the question was raised whether the matter was one of a quasi-criminal nature, or on the Crown side of the Court, which should be brought before the full Court (*Regina* v. *Beale*, 11 Man. L. R. 448, 16 Occ. N. 395), or one which could be brought before a single Judge.

By s. 37 of the Queen's Bench Act, 1895, the jurisdiction of the Court is to be exercised, so far as regards practice and procedure, in the manner provided by the Act or by the Rules made pursuant thereto. And by s. 45 every action and proceeding in the Court, except as otherwise provided, is, so far as practicable and convenient, to be heard, determined, and disposed of before a single Judge.

But both s. 89 of the Act and Rule 1 except from the operation of the Act and Rules the procedure in criminal matters and proceedings on the Crown side of the Court.

The Court was not at first disposed to consider that the matter was in any sense a criminal matter, but, in view of such opinions as those expressed in *Seaman* v. *Burley*, 75 L. T. 91, *Payne* v. *Wright*, 66 L. T. 148, and *Ex p. Schofield*, 64 L. T. 780, the Court was of opinion that the question deserved further argument.

A matter of this kind in which only a small sum is involved should not be delayed for the time that would be necessary if the motion for a *certiorari* were argued before the full Court, and it would be best to adjourn the motion

into Chambers if the parties were willing; otherwise to dismiss it without prejudice to a motion in Chambers.

By consent the matter was adjourned into Chambers.

Haney, for the applicant.

Patterson, for the magistrate.

REGINA v. WINSLOW.

Criminal law—Theft—Pocket-picking—Evidence—Sufficiency.

Reserved case. The prisoner was summarily tried and convicted of having stolen a pocket book containing money from the person of one Mrs. Douglas.

The trial Judge stated a case, setting out the evidence given at the trial in full, and submitting the question whether there was sufficient evidence to have warranted the leaving of the case to a jury, if a jury had been sitting. The prisoner also moved for a new trial on the ground that the verdict was against the weight of evidence. At most, the evidence seemed to show that Mrs. Douglas entered the grounds of the Winnipeg Exhibition with a large number of people, and having in her pocket a purse containing the money mentioned; that she stopped in a crowd to watch something that attracted her attention; that there was a commotion in the crowd, during which the prisoner pushed her or was pushed against her; that just as this occurred a police constable saw the prisoner putting his hand in a fold of her dress which he took to be the situation of her pocket; that the purse was then missed, and the prisoner having been arrested had upon him money in notes and silver, some of which were of the denominations of the money in Mrs. Douglas's purse, but none of which could be identified as having been hers.

Held, that upon such evidence a jury should have been directed to acquit the prisoner. The evidence did not raise more than a mere suspicion against the prisoner and was not sufficient in law to warrant a conviction.

While it was possible that the case might properly have been submitted to a jury as to the sufficiency of the identification of Mrs. Douglas by the constable, and of the prisoner by both of them, even here it was exceedingly weak.

Conviction quashed.

Bonnar, for the prisoner.

Patterson, for the Crown.

[22ND DECEMBER, 1899.

In re ROCKWOOD AGRICULTURAL SOCIETY.

Real Property Act—Power of agricultural society to borrow money and mortgage property.

Petition by way of appeal from a ruling of a District Registrar, referred from Chambers.

The petition showed that the society was the registered owner, under the Real Property Act, of a certain parcel of land; that it desired to borrow money for the purpose of erecting upon this land buildings already in process of construction, and had made arrangements for the loan of the money upon the security of the land and of the proposed buildings; that it had no other means of paying for the buildings than by such a transaction; and that the society executed a mortgage of the lands in favour of a company, and applied to the District Registrar to register the same, but he refused to do so.

The grounds for this refusal were that the power to mortgage for the purpose for which the mortgage was being made must be expressly or impliedly conferred by statute, and that the District Registrar could find none such conferred.

The petition asked for a declaration that the society had the power to borrow the money and to mortgage the land as security therefor.

It was assumed that the society had been incorporated under the Agricultural Societies Act, 55 V. c. 2.

Held, that the petition must be dismissed; no power to borrow money was given to the society; it followed that it

could not mortgage its property to secure a loan. It did not appear that any such power was necessary to the accomplishment of the objects of the society, or was in any way incident to the operations which it was entitled to undertake.

The society was best described as a quasi-municipal corporation. Though it had certain limited powers of buying and selling, it was in no sense a trading corporation, and the law as to the borrowing powers of trading corporations was not applicable.

The true rule of law was that laid down in *Regina* v. *Reed*, 5 Q. B. D. 433.

By 62 & 63 V. c. 24, s. 33, the council of the rural municipality of Rockwood was given power to guarantee a loan to the Rockwood Electoral Division Agricultural Society, "to be effected or procured by the said society for the purpose of erecting buildings and the improvement of the grounds of the said society." It was argued that this provision gave to the society the power to borrow, or, at any rate, showed that the Legislature had previously intended that such societies should possess the power.

Held, that the language used should not be interpreted as giving to the society any power which it did not previously possess.

A misapprehension of the law by the Legislature would not have the effect of making that the law which the Legislature had erroneously assumed it to be: *North-West Electric Co.* v. *Walsh*, 29 S. C. R. 33.

Crawford, Q.C., for the petitioner.

Wilson, for the District Registrar.

KENNEDY v. RURAL MUNICIPALITY OF PORTAGE LA PRAIRIE.

Municipal corporations—Highway—Liability for non-repair of road—Municipal Act, R. S. M. c. 100, s. 618.

Appeal from a judgment of the County Court of Portage la Prairie against a rural municipality awarding to the plaintiff damages for injury to a horse claimed to have been occasioned by non-repair of a highway. The non-repair consisted

in the continued existence of a series of hollows, styled pitch holes, produced by traffic in the snow-covered surface of a travelled road; the holes were in almost uninterrupted succession, at intervals of only a few feet, varying in depth from one to four feet below the level of the travelled snow-road. The descent and ascent of the pitch holes were so steep and their depth so great as to make travel, especially with loads, extremely difficult and even unsafe. A small expenditure of municipal moneys would have so mitigated the evil as to render the travel safe. It was not disputed that the defendant municipality was bound to keep the road in repair: Municipal Act, R. S. M. c. 100, s. 618.

Held, BAIN, J., dissenting, that the appeal should be dismissed with costs: *Caswell* v. *St. Mary's Road Co.*, 28 U. C. R. 247; *Walker* v. *City of Halifax*, 16 N. S. Reps. 371, Cass. Dig. 175.

Anderson, for the plaintiff.

James and *Perdue*, for the defendants.

[DUBUC, J., 21ST DECEMBER, 1899.

MILLER v. McCUAIG.

Fraudulent preference—Land purchased by debtor—Patent issued in brother's name.

Question as to the ownership of a quarter section of land.

The defendant Roderick McCuaig lived in Manitoba; the defendant John McCuaig in Glengarry, Ontario.

In January, 1888, the land in question was purchased from the Dominion Government in the name of John McCuaig, but the negotiations were conducted by Roderick McCuaig. The price was one-fifth cash, balance in four yearly instalments. The money for the first payment was advanced by Duncan McCuaig, another brother, and the other instalments paid by Roderick from the proceeds of the land. Since the purchase in 1888, the title had stood in the name of John, though it had been farmed and operated by Roderick, either by himself and his brothers or by tenants

placed on it by Roderick for his benefit. John never disbursed one dollar for the land, nor received one cent from the same, or the proceeds thereof. After the last instalment was paid the patent was issued to John, though he admitted he never asked for it nor paid anything for its issue. The land was subsequently mortgaged for $2,000, $800, and $300, but John received nothing of the amount obtained, and paid nothing of interest or principal. John declared Roderick acted as his agent, but Roderick never rendered him any account, and John never asked for any, nor did John pay any of the taxes.

The plaintiff was a judgment creditor of Roderick, and asked for a declaration that the land belonged in reality to Roderick; that it might be sold and the proceeds applied in payment of his judgment.

Held, that the land in question had been purchased in the name of and held by John McCuaig for the sole benefit of Roderick McCuaig; that Roderick was the beneficial and real owner of the same; that the lands should be sold under the direction of the Court and the proceeds applied in satisfaction of the plaintiff's judgment against Roderick; the plaintiff to have the costs of the suit.

Anderson, for the plaintiff.

Cooper, Q.C., for the defendant.

Supreme Court of Canada.

ONTARIO.] [27TH OCTOBER, 1899.

YOUNG v. TUCKER.

Appeal—Jurisdiction—County Court case—Removal into High Court—Report of Drainage Referee.

An action was begun in the County Court of Lambton to recover damages for injury to the plaintiffs' land by water from the the defendant's drains. After issue joined the County Court Judge, exercising the jurisdiction of a local Judge of the High Court of Justice, ordered the cause to be removed into the High Court, stating in his order that a question as to the jurisdiction of the County Court had been properly and *bona fide* raised. All subsequent proceedings were carried on in the High Court, and at the trial a reference was ordered to the Drainage Referee, who held that the plaintiffs had no cause of action. The Court of Appeal reversed this holding, and gave judgment for the plaintiffs: 26 A. R. 162, 19 Occ. N. 133.

The defendant appealed to the Supreme Court of Canada.

Held, that the action was not originally brought in a Superior Court, as required by R. S. C. c. 135, ss. 24 (*a*) and 28, and there was no jurisdiction to hear the appeal; and it was therefore quashed.

Decision of OSLER, J.A., allowing the appeal to the Supreme Court, 18 P. R. 449, 19 Occ. N. 213, overruled.

Aylesworth, Q.C., for the plaintiffs.

Riddell, Q.C., for the defendant.

BRITISH COLUMBIA.] [24TH OCTOBER, 1899.

MADDEN v. CONNELL.

Mines and minerals—Adjoining claims—Overlapping—Initial post—Foreign territory.

Two persons having located mining claims in British Columbia near the United States boundary line, it turned out that a piece of ground was included in both, and an action was brought to determine the title thereto. On the trial it was proved and conceded that the initial post of the defendant's claim was south of the boundary line, and so in foreign territory.

Held, affirming the judgment of the Supreme Court of British Columbia, 6 Brit. Col. L. R. 531, that, in consequence of this situation of the defendant's initial post, his location was utterly void.

Robinson, Q.C., for the appellant.

A. F. May, for the respondent.

[7TH NOVEMBER, 1899.

WOOD v. CANADIAN PACIFIC R. W. CO.

Negligence—Railway company—Condition of road bed.

W., an employee of the defendants, in British Columbia, a part of whose duty it was to couple and uncouple cars, was between two cars on a side track, uncoupling, when the train backed, and in attempting to get out of the way his feet were caught in the long grass and weeds which had accumulated on the road bed, whereby he was struck by the train and seriously injured. In an action to recover damages for such injury:—

Held, affirming the judgment of the Supreme Court of British Columbia, 6 Brit. Col. L. R. 561, that permitting the grass and weeds to accumulate on the side track was not such negligence on the part of the company as would render them liable in damages to W.

Joseph Martin, Q.C., for the appellant.

W. Nesbitt, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [20TH NOVEMBER, 1899.

ALLCROFT v. MORRISON.

Security for costs—Residence out of Ontario—"Ordinarily resident"—Rule 1198.

Rule 1198 provides that security for costs may be ordered, among other cases, in the following: "(*a*) where the plaintiff resides out of Ontario; (*b*) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario."

The defendant's affidavit stated that the plaintiff was now residing out of the jurisdiction, and also that he had no certain place of abode within the jurisdiction; that he had hitherto resided out of the jurisdiction; and at the conclusion of the pending suit intended to reside out of the jurisdiction of the Court. The plaintiff's affidavit stated that he had not for the past year, nor had he now, any fixed or ordinary place of abode either in or out of the Province of Ontario, his occupation requiring that he should be from time to time in England, the Province of Ontario, and the Province of New Brunswick.

Held, that the actual residence abroad was still what *prima facie* entitled the defendant to security, and the plaintiff could not answer the application by shewing that he had no fixed residence at all.

Denier v. *Marks*, 18 P. R. 465, 19 Occ. N. 229, overruled.

Judgment of a Divisional Court reversed.

J. M. Clark, Q.C., for the appellant.

H. D. Gamble, for the respondent.

[25TH JANUARY, 1900.

In re CONFEDERATION LIFE ASSOCIATION AND CORDINGLY.

Interpleader—Summary application—Rule 1103 (a)—Insurance moneys—Adverse claims—Foreign claimants—Notice of motion—Service out of jurisdiction—Rule 162 (3).

Certain moneys were payable by an insurance company under several life policies in favour of the assured, his executors, administrators, or assigns. The moneys were claimed by the executors, who resided in Manitoba, where the assured died, and who were threatening suit there, and also by the widow, who resided in Quebec, and had brought an action against the company there. The company's head office was in Ontario, and they launched an application in the High Court for a summary interpleader order.

Held, reversing the decision of a Divisional Court, 19 P. R. 16, 19 Occ. N. 313, and restoring that of MEREDITH, C.J., *ib.*, that the company were entitled to avail themselves of the provisions of Rule 1103 (*a*), as persons under liability for a debt in respect of which they were, or expected to be, sued by two or more persons; and service out of Ontario of the company's notice of motion for the interpleader order was properly allowed under Rule 162 (3).

Riddell, Q.C., and *Snow*, for the appellant.

J. J. Maclaren, Q.C., for the respondent.

SUPREME COURT OF THE INDEPENDENT ORDER OF FORESTERS v. PEGG.

Summary judgment—Rule 603—Mortgage action—Claim for immediate possession—Recovery of land—Rules 138, 141.

A writ of summons was indorsed, under Rule 141, with claims for foreclosure of a mortgage, for immediate delivery of possession of the mortgaged premises, and for immediate payment of the mortgage money.

Held, that it could not be said to be specially indorsed under Rule 138 so as to entile the plaintiffs to move under Rule 603 for summary judgment for recovery of land.

Decision of a Divisional Court affirmed.

James Bicknell, for the appellants.

S. B. Woods, for the respondent.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 18TH DECEMBER, 1899.

SWAYZIE v. SWAYZIE.

Foreign judgment—Divorce and alimony—Domicil—Jurisdiction—Submission to—Production of record—Presumption — Rebuttal — Dealing with lands in Ontario.

In an action on a judgment of a foreign state, granting a husband a divorce and a wife a sum of money as alimony, it was contended by the husband that, as he had never acquired the necessary domicil to give the foreign Court jurisdiction to grant the divorce, the judgment was invalid.

Held, that, as he had invoked and submitted to the jurisdiction of the foreign Court, he had precluded himself from setting up any want of jurisdiction.

Held, also, that, in the absence of anything appearing on the face of the proceedings to show want of jurisdiction, the production of the record was *prima facie* evidence entitling the plaintiff to recover; and, although the presumption in favour of the judgment may be rebutted, clear proof of facts to show want of jurisdiction must be adduced.

Semble, that the judgment being pronounced in a proceeding instituted by the husband which the Court had jurisdiction to entertain, in which it was competent for the Court, when dissolving the marriage, to direct a division of the husband's property, including his Ontario lands, it would be anomalous that he, having by his own act submitted to the Court so doing, and having obtained his divorce on that condition, should be heard to say that the Court had no power to deal with the lands in Ontario.

Judgment of ROBERTSON, J., reversed.

German, Q.C., for the plaintiff.

Snow, for the defendant.

[18TH JANUARY, 1900.

PHAIR v. PHAIR.

Arrest—R. S. O. c. 80, s. 1—Intent to quit Ontario—Intent to defraud creditors.

It is not sufficient for a creditor applying for an order for arrest under R. S. O. c. 80, s. 1, to shew the existence of a debt and that the debtor is about to quit Ontario; he must shew some other fact or circumstance which, coupled with those facts, points to an intent to defraud.

Shaw v. *McKenzie*, 6 S. C. R. 181, *Toothe* v. *Frederick*, 14 P. R. 287, and the opinions of BURTON and MACLENNAN, JJ.A., in *Coffey* v. *Scane*, 22 A. R. 269, followed.

The opinions of HAGARTY, C.J.O., and OSLER, J.A., in *Coffey* v. *Scane*, and the case of *Robertson* v. *Coulton*, 9 P. R. 16, dissented from.

McVeain v. *Ridler*, 17 P. R. 353, discussed.

Whether or not there is good and probable cause for believing that the intent to defraud exists, is a question of fact.

And where the defendant believed that his wife had no claim against him for alimony:—

Held, that he could not be intending to defraud her by leaving Ontario.

Grayson Smith, for the plaintiff.

J. H. Moss, for the defendant.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 2ND JANUARY, 1900.

COWAN v. FISHER.

Contract—Breach—Condition precedent—Divisible contract.

The defendants agreed to buy a machine, the agreement being in the form of an order signed by the defendants and adopted and accepted by the plaintiffs, who shipped the machine ordered, and now sued for the price.

It had been a term or condition of the agreement that M., the inventor of the machine, and the plaintiffs' agents for sales of it, should personally inspect the placing of the machine in operation. This M. failed to do, but the plaintiffs

sent a competent person to set the machine up, whom, however, the defendants would not allow to do so, inasmuch as M. was not present.

Held, that the plaintiffs, nevertheless, were entitled to judgment for the price of the machine, on the principle that unless the non-performance alleged in breach of a contract goes to the whole root and consideration of it, the part broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages.

S. H. Blake, Q.C., and *H. C. Gwyn*, for the defendants.

E. F. B. Johnston, Q.C., for the plaintiffs.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 2ND JANUARY, 1900.

MYERS v. BRANTFORD STREET R. W. CO.

Street railways—Operation of electric car—Duty of motor man—Frightening horses—Nonsuit.

It is the duty of a motor man, operating an electric car upon a public street, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse; and it is also his duty in running the car to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams.

Ellis v. *Lynn and Boston R. R. Co.*, 160 Mass. 341, applied.

Held, in this case, STREET, J., dissenting, that the fair inference from the evidence was that the motor man saw that the plaintiff's horses were becoming frightened by the moving car, and that they were likely to become unmanageable and run away, and that he saw the signal given by the plaintiff and understood it to be a signal for him to stop the car; and it was his duty, under these circumstances, to do what he reasonably could to avoid the obvious danger; and the case should not have been withdrawn from the jury.

Brewster, Q.C., for the plaintiff.

Sweet, for the defendants.

[23RD JANUARY, 1900.

TEW v. ROUTLEY.

Landlord and tenant—Lease—Assignment without leave—Forfeiture—Election—New lease—Waiver—Distress—Acceleration clause—Assignment for benefit of creditors—Notice under R. S. O. c. 170, s. 34, s.-s. 2—Sale of goods on demised premises—Agreement—Condition—Construction.

A lease of a store was made for five years, at the yearly rental of $700, payable by even portions quarterly in advance, with the statutory covenant that the lessee should not assign or sublet without leave, and with a proviso that if the lessee should make an assignment for the benefit of creditors, the then current and the next quarter's rent and the taxes for the then current year should immediately become due and payable as rent in arrear and be recoverable by distress or otherwise.

During the term, on the 24th January, 1898, the lessee made an assignment for the benefit of his creditors to the plaintiff, who sold the stock of goods in the store to the defendant. By the terms of the agreement of sale the defendant was to assume the rent and taxes and to arrange with the landlord of the premises as to tenancy. On the 14th February, 1898, the defendant's husband went into possession of the store and of the stock of goods, which had remained therein, and continued thereafter in possession of the store. On the 5th April, 1898, the lessors distrained the goods of the defendant in the store for $644, made up of $175 rent due on the 1st October, 1897, $175 rent due on the 1st January, 1898, $175 "the next quarter's rent," by virtue of the proviso in the lease, and $119 for the taxes for 1898, in respect of which sums they claimed to be preferred creditors on the estate of the lessee. The plaintiff paid the claim and costs under protest, and brought an action against the lessees to recover back $319.32 of it, which action was dismissed on the 14th December, 1898: *Tew* v. *Toronto Savings and Loan Co.*, 30 O. R. 76, 19 Occ. N. 35.

On the 17th December, 1898, the lessors made a lease of the store to the defendant's husband to hold for three years from the 14th February, 1898.

In this action the plaintiff alleged that he was entitled to be paid by the defendants $322, being the proportion of the rent from the 14th February to the 1st July, 1898, which the defendant agreed to assume and pay. At the trial it appeared that the lessors never consented in writing to the assignment of the demised premises to the plaintiff, and that the plaintiff never assigned the premises to the defendant, and that the lessors never recognized as rightful the occupation of the premises by the defendant. The plaintiff did not give notice to the lessors, under R. S. O. c. 170, s. 34, s.-s. 2, electing to retain the store for the unexpired term, or any portion of it.

Held, that the lessors, by granting the lease of the 17th December, 1898, elected to avoid their former lease, they having done nothing in the meantime to waive the forfeiture thereof incurred by the assignment to the plaintiff. The distress was no waiver of the forfeiture, for it was for rent and taxes which became due by virtue of the provisions of the lease on the date of the assignment. The election to forfeit the original lease referred back to the time when the breach of the terms of that lease occasioning the forfeiture took place, that is, the date of the assignment. The plaintiff might have avoided the forfeiture of the lease and the acceleration of the payment of the rent and taxes by giving, within one month from the execution of the assignment, a notice in writing to the lessors electing to retain the store for the unexpired term or a portion of it.

Held, also, that the condition in the agreement of sale between the plaintiff and defendant, that the latter was to assume the rent and taxes and to arrange with the landlord as to tenancy, did not mean that the defendant was to assume any part of the rent and taxes which by virtue of the provision of the lease had become due on the previous 24th January, but rather that the defendant should arrange with the landlord as to tenancy and assume the rent and taxes payable in virtue of the tenancy so arranged.

Aylesworth, Q.C., for the defendant.

C. D. Scott, for the plaintiff.

[ARMOUR, C.J., FALCONBRIDGE, J., 4TH JANUARY, 1900.

In re HARRISON.

Life insurance—Benefit society—Certificate—Indorsement for benefit of wife—Subsequent revocation by will—By-laws of society—R. S. O. c. 203.

A certificate of life insurance issued to a member by a benefit society stated on its face that it was subject to the provisions of the by-laws, rules, and regulations of the society. One of the by-laws provided for the payment of the insurance money to any person nominated by indorsement, which indorsement might be revoked. The member, by indorsement on the certificate, directed that all money accruing upon it should be paid to his wife upon his death; but, subsequently, by will directed that only a portion of it should be paid to her, and the balance to his half-brothers and sisters.

Held, that the insurance was subject to the provisions of the Ontario Insurance Act, R. S. O. c. 203; and the by-laws and rules of the benefit society, in so far as they were inconsistent with such provisions, were to be regarded as modified and controlled by them. The statute provided in effect that when the indorsement was in favour of the wife of the member, he could not revoke it, and the by-law was in this respect modified and controlled by the statute.

Mingeaud v. *Packer*, 21 O. R. 267, 19 A. R. 290, applied and followed.

F. A. Anglin, for the widow.

R. S. Smellie, for the executor.

G. F. Macdonnell, for the beneficiaries under the will.

[BOYD, C., FALCONBRIDGE, J., 9TH JANUARY, 1900.

HARRIS v. BANK OF BRITISH NORTH AMERICA.

Interpleader—Summary application—Rule 1103 (a)—Money in bank—Adverse claims—Foreign claimants—Jurisdiction.

The decision of ROSE, J., *ante* 15, affirming an order of the Master in Chambers which dismissed a summary application for an interpleader order in respect of certain

moneys deposited with the defendants and claimed by the plaintiff by this action brought in Ontario, and also by an English corporation by an action brought in England, was affirmed on appeal.

Held, that the mere fact that an action was possible here because a branch office of the bank was in Toronto, was not enough to attract to this forum the extraordinary or special remedy by way of interpleader, as against the English corporation; and a salutary discretion was exercised in refusing the application.

John Greer, for the defendants.

D. O. Cameron, for the plaintiff.

W. H. Blake, for the other claimants.

[BOYD, C., 17TH JANUARY, 1900.

In re ALLEN AND NASMITH.

Landlord and tenant—Renewable lease—Buildings erected by tenant—Absence of covenant as to—Fixing rent on renewal—"Ground rent"—Award.

A renewal lease is a continuation of the old lease, and if rent for buildings erected by the tenant is not provided for under the first lease, neither should it be under the extension, in the absence of express provision.

And an application to refer back an award in a case where a tenant had a renewable lease, and had during the first lease erected buildings on the premises, nothing being said in the lease about buildings, and the arbitrators in arriving at the rent for the renewal term had fixed a "ground rent" without taking the buildings into consideration, was dismissed with costs.

Aylesworth, Q.C., for Allen.

Snow, for Nasmith.

[ROSE, J., 24TH NOVEMBER, 1899.

In re FORSTER AND CITY OF HAMILTON.

Municipal corporations— By-law — License—Cancellation — Delegation of powers.

A municipal corporation cannot delegate to a board of health any power to cancel a license which it may have under 62 V., sess. 2, c. 26, s. 37 (2); and a by-law delegating such power was quashed.

Hodge v. *The Queen*, 9 App. Cas. 117, and *The Queen* v. *Burah*, 3 App. Cas. 889, followed.

Lynch-Staunton, Q.C., for the applicant.

MacKelcan, Q.C., for the corporation.

[FALCONBRIDGE, J., 11TH JANUARY, 1900.

CITY OF TORONTO v. METROPOLITAN R. W. CO.

Railways—Order of Railway Committee of Privy Council of Canada—Junction of electric Railway with Canadian Pacific Railway—Laying switch on highway—Power to authorize—Expropriation of right of way —Injunction—Enforcement of agreement.

The defendants were a company incorparated under statutes of the Province of Ontario, operating an electric railway upon Yonge street between the town of Newmarket and the city of Toronto, with its southern terminus in the northern part of the city, a few yards north of the Canadian Pacific Railway lines. By order of the 23rd November, 1899, the Railway Committee of the Privy Council of Canada, reciting the consent of counsel on behalf of the corporation of the city of Toronto, approved of the defendants connecting their tracks with the tracks of the Canadian Pacific Railway by means of a switch, as shown on a plan annexed to the order, and on the conditions imposed by the order.

Held, that the defendants had not the right, without the authority or consent of the city corporation, to occupy or expropriate or otherwise to force their way over a part of Yonge street within the limits of the city so as to enter the lands of the Canadian Pacific Railway Company and make the proposed junction. The order of the Railway Committee

was to be regarded as dealing only with the mode of junction or union, and not as expropriating or professing to expropriate a right of way over the highway. And the consent of counsel for the city corporation, when before the Railway Committee, was to be viewed in the same way. Section 173 of the Railway Act of Canada does not give the Railway Committee power to expropriate land or to deal with the right of property. The protection of the crossing or junction is the object of the committee, which has to approve of the place and mode thereof, and which is not concerned, so far as this section applies, with how the railways arrive at the point of union.

Held, also, that the defendants had not, by virtue of any statute or agreement, viewing their road as a mere street railway, the right to expropriate the right of way; and even if their road was a railway within the meaning of the Railway Act, s. 183 was not applicable, for the proposition here was not to carry the tracks "along an existing highway," and they could not avail themselves of s. 187, for the provisions of law applicable to the taking of land by the company had not been complied with.

The plaintiffs were therefore entitled, without derogation of the order of the Railway Committee, to an injunction restraining the defendants from effecting the proposed junction by the method shewn on the plan.

By an agreement made between the plaintiffs and defendants in 1891, the defendants agreed and undertook that upon receiving at any time twenty-four hours' notice from the plaintiffs' engineer they would cease running their cars by electricity on the portion of Yonge Street within the city limits.

Held, that, nothing having occurred to operate as a waiver by the plaintiffs of this term of the agreement, and the engineer's notice having been given on the 14th November, 1899, the plaintiffs were entitled to an injunction restraining the defendants from propelling their cars by electricity within the limits of the city.

Osler, Q.C., and *Caswell*, for the plaintiffs.

Aylesworth, Q.C., and *W. Barwick*, Q.C., for the defendants.

[MacMahon, C.J., 13th December, 1899.

McQUILLLAN v. TOWN OF ST. MARY'S.

Municipal corporations—Negligence—Ice on sidewalk—Notice before action—Sufficiency of—R. S. O. c. 223, s. 606, s.-s. 3.

This was an action to recover damages for injuries alleged to have been sustained by the plaintiff owing to his slipping on a quantity of snow and ice in a street in the town of St. Mary's, which the defendants were alleged to have negligently allowed to accumulate.

The statutory notice required by R. S. O. c. 223, s. 606, s.-s. 3, given on behalf of the plaintiff, described it as having taken place opposite to a certain shop, whereas, in fact, it took place opposite a different shop, about twenty feet further on the same side of the street.

Held, that the notice was sufficient, as it gave information enough to enable the corporation to investigate, and that is all that can be called for.

Mabee, Q.C., for the plaintiff.

Idington, Q.C., for the defendants.

IN CHAMBERS.

[Armour, C.J., 13th January, 1900.

In re JACKSON v. CLARK.

Mandamus—Division court—Committal of judgment debtor — Non-production of books—Notice of motion—Uncertificated solicitor.

Motion by the plaintiff for a mandamus to the second junior Judge of the County of York directing him to commit the defendant for non-production of his books under a *subpoena duces tecum,* and pursuant to notice, on his examination as a judgment debtor under s. 243 of the Division Courts Act, in a plaint in the 1st Division Court in the county of York.

The Judge refused to commit because, there being no express provision in the Division Courts Act authorizing a

committal for non-production of books, and the liberty of the subject being involved, he thought it wiser to take that course.

Held, without expressing any opinion as to whether the Judge was right or wrong in his view, in favour of which there was a good deal to be said, that the Judge having given judgment in a matter within his jurisdiction, mandamus would not lie to compel him to give a different judgment.

A preliminary objection that the notice of motion was given by an uncertificated solicitor was answered by *Sparling* v. *Brereton*, L. R. 2 Eq. 64.

Motion dismissed with costs.

Langley, for the plaintiff.

W. R. Smyth, for the defendant.

In the County Court of the County of Elgin.

[HUGHES, Co.J., 23RD NOVEMBER, 1899.

GREER v. THODY.

Contract — Sale of business and goodwill—Undertaking not to carry on similar business — Meaning of "goodwill"—Injunction—Damages — Costs.

The defendant prior to the 16th November, 1898, was the owner and driver of a stage-coach running daily between Aylmer and St. Thomas. The business consisted, besides the carrying of passengers, in the soliciting, calling for, carrying, and delivering of parcels for reward. The stock comprised horses and vehicle, robes, etc., used in connection with the business.

On the 16th November, 1898, the defendant sold all the stock and the goodwill of the business to the plaintiff for $300, and agreed not to go into the same business, or a similar business, between the same places, for three years from the 1st December, 1898.

Notwithstanding this agreement and the receipt of the $300, the defendant entered the employment of Pierce & Son, who, on the 1st August, 1899, started an opposition stage-coach on the same route and for the same business and purpose; and the defendant became the caller, canvasser for business, and driver of Pierce's coach.

This action was for an injunction and damages.

A. McCrimmon and *W. A. Wilson*, for the plaintiff.

Andrew Grant, for the defendant.

HUGHES, Co. J.:—The questions arise, first, whether the conduct of the defendant is a violation of the terms of his agreement; and, second, what is the meaning of his selling the "goodwill" of his business.

A number of cases have been cited as shewing that the taking of employment from other persons in the same trade is not a breach of an agreement not to exercise or carry on a trade, unless the person who has sold his business receives some portion of the profits. *Allen* v. *Taylor*, 19 W. R. 556, and *Rolfe* v. *Rolfe*, 15 Sim. 88, differ from the present case in that in neither of them was there any mention of the selling and handing over the goodwill of the business as part of the consideration. *Turner* v. *Evans*, 2 DeG. M. & G. 745, is an authority to support the view which I take.

Viewing all the facts and circumstances of this case in the light of the authorities I have consulted, I find that there has been a breach of the defendant's agreement, and a dishonest attempt to deprive him of what the plaintiff honestly paid for, i.e., of the inducement for the payment of the $300.

The goodwill of a business is like an incorporeal chattel or right incident to chattels, e.g., patent right, copyright: see Stephen's Commentary and the Law of Lexicons.

The definition which I find of the goodwill of a business is: the custom of any trade or business, i.e., the advantage or benefit which is acquired by a business beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage

and encouragement which it receives from constant or habitual customers. It is considered a subject of sale with the stock and premises, and of itself a marketable, saleable, and purchaseable commodity.

As held by Jessel, M.R., in *Genesi* v. *Cooper*, 14 Ch. D. 596, referring to *Labouchere* v. *Dawson*, L. R. 13 Eq. 322, I hold that a man who has sold the goodwill of his business or trade must not solicit the old customers to deal with him, or hold out to them that he is still in the business, and that he must not deal with the old customers.

The importance and value of the goodwill of a business —strongly applicable to the facts and circumstances of this case—were strikingly explained in *Churton* v. *Douglas*, Joh. 174.

Upon the authority of that case I hold in this case that when the defendant sold the goodwill of the business, he parted with all that good disposition which customers and persons travelling by stage between Aylmer and St. Thomas entertain towards the defendant,the confidence they have in his trustworthiness as a driver, in his promptitude and honesty in the carrying and delivering of parcels and goods, so that they would probably continue their custom with him; and the goodwill can be nothing short of that. It was a most important part of what was purchased; and when the defendant parted with it, he handed over to the plaintiff all the benefit which might be derived from holding himself out to the customers as still carrying on the business which had acquired a reputation by being conducted by himself.

Owing to the peculiar nature of the employment, and the necessity for trustworthiness in the person employed, the defendant cannot be employed in a similar position without violating his agreement and depriving the plaintiff of what he has paid a large sum of money to obtain. There was a plain intention that he should not engage in the business for three years, and his taking employment in the same business with other proprietors was a breach of the agreement, and an infringement of the plaintiff's purchased goodwill.

Judgment will go for an injunction for three years from the 1st December, 1898, and for nominal damages, $1.

Had s. 75 of the Division Courts Act been allowed to continue in force, this action might have been brought in a Division Court, but, as the effect was destroyed by 61 V. c. 15, s. 1, it was properly brought in this Court, and costs of this Court must be taxed against the defendant.

[See *Snider* v. *McKelvey*, 31 O. R. 91; 19 Occ. N. 317.]

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[McDonald, C.J., 16th January, 1900.

REGINA v. LEET.

Criminal law—Theft—Warrant of commitment—Form of.

Application, under the Liberty of the Subject Act, for an order for the discharge of the defendant from custody, on the ground that no offence was disclosed by the warrant of commitment, which simply stated that the defendant "did steal a certain waggon," etc.—without alleging the absence of colour of right, and without laying in any person the property in the waggon.

Held, that the warrant contained a sufficiently definite statement of the alleged crime of theft.

Application dismissed.

W. A. Henry, for the defendant.

No one appeared for the Crown.

[19TH JANUARY, 1900.

In re BORNTILIER.

Infant—Bastard—Custody—Benefit of child.

Application by the mother of Gladys Borntilier, a two-year-old illegitimate child, for an order awarding the applicant the custody of the child for the purpose of placing it in a charitable institution. The child was at the time of the application in the custody of the father. The mother was admittedly of bad character. The father's reputation was not good, but he was now married to a respectable woman who would care for the child.

Held, that it was not for the child's interest to remove her from her present surroundings, as there was no guarantee that the institution would do more than board her, nor that it would continue to do even that for any length of time.

John J. Power, for the applicant.

Drysdale, Q.C., for the father.

[GRAHAM, E.J., 19TH DECEMBER, 1899.

In re CUNNINGHAM.

Company—Winding-up—Calls—Enforcement of order of Court of another Province—Married woman—Collection Act.

An application for a *certiorari* to remove proceedings of commissioners under the Collection Act, 1894.

W. B. MacCoy, for the applicant.

L. M. Johnston, contra.

GRAHAM, E.J.—Under the Supreme Court Rule of 28th January, 1891, in respect to the winding-up of insolvent companies, it is prescribed that an order for the payment of calls shall have the same effect as a judgment for the payment of money, and shall be entered as a judgment by the prothonotary in the book mentioned in Rule 39 of the Supreme Court, 1884.

In this case the order of the High Court of Ontario has been simply filed with the prothonotary. This would not be sufficient even if the order was an order of the Supreme Court of Nova Scotia.

I cannot help thinking that, as this order is against a married woman, our Court at least would not have power to enforce it except against her separate estate.

I doubt if the Collection Act applies to such a case.

The application for a writ of *certiorari* should be granted. No objection was made that the writ was not the appropriate remedy. The costs will abide the event.

Supreme Court of Canada.

ONTARIO.] [29TH NOVEMBER, 1899.

GOOD v. TORONTO, HAMILTON, AND BUFFALO R. W. CO.

Contract — Construction of railway — Certificate of engineer — Condition precedent.

Where the contract for construction of a railway provided that the work was to be done to the satisfaction of the chief engineer of a railway company, not a party to such contract, who was to be the sole and final arbiter of all disputes between the parties, the contractors were not bound by such condition, when the person named as arbiter proved to be, in fact, the engineer of the other party to the contract, while supposed by the contractors to be the engineer of the railway company, as described.

Judgment of the Court of Appeal, 26 A. R. 133, 19 Occ. N. 131, affirmed.

D'Arcy Tate, for the appellants, the Dominion Construction Company.

Aylesworth, Q.C., and *Washington*, Q.C., for the respondents, the plaintiffs.

RANDALL v. HOME LIFE ASSOCIATION OF CANADA.

Life insurance—Action on policy—Pleading—Condition precedent -Burden of proof—Waiver.

A life insurance policy contained a condition providing for payment in ninety days after satisfactory proofs of death were furnished to the association; another that death from consumption and certain other diseases was not covered by the policy; and another setting out what proofs must be

given. In an action on this policy the plaintiff alleged that she had furnished proof of the death of the insured on a certain date, and that all conditions were performed and all times elapsed to entitle her to payment. The defendants denied these allegations and put the plaintiff to strict proof thereof.

Held, that under the Ontario Judicature Act, differing in this respect from the practice in England, the plaintiff was bound to prove the truth of her above allegations; that giving of satisfactory proofs was a condition precedent to her right of action, performance of which she had to allege and prove; that no rule of law obliged the defendants to prove non-performance; that there was no evidence of waiver of proof as contended by the plaintiff; and that in any case the plaintiff could not recover, as the proofs given, taken in connection with the evidence, showed the deceased to have died of consumption, which was not covered by the policy.

Judgment of the Court of Appeal, 9th May, 1899, reversed.

Osler, Q.C., and *A. Hoskin*, Q.C., for the appellants, the defendants.

Watson, Q.C., and *Lancaster*, for the respondent, the plaintiff.

McMURRAY v. BINGHAM.

Contract—Sale of patent—Future improvements—Money paid—Recovery back.

By contract under seal M. agreed to sell to B. and S the patent for an acetylene gas machine, for which he had applied, and a caveat had been filed, and also all improvements and patents for such machine that he might thereafter make, and covenanted that he would procure patents in Canada and the United States and assign the same to B. and S. The latter received an assignment of the Canadian patent, and paid a portion of the purchase money, but when the American patent was issued it was found to contain a variation from the description of the machine in the caveat, and they refused

to pay the balance, and in an action by M. to recover the same they demanded, by counterclaim, a return of what had been paid on account.

Held, reversing the judgment of the Court of Appeal, 29th June, 1899, that the agreement was not satisfied by an assignment of any patent that M. might afterwards obtain; that he was bound to obtain and assign a patent for the machine described in the caveat referred to in the agreement; and that, as the evidence showed the variation therefrom in the American patent to be most material, and to deprive the purchasers of a feature in the machine which they deemed essential, M. was not entitled to recover.

Held, further, GWYNNE, J., dissenting, that, as B. and S. accepted the Canadian patent and paid a portion of the purchase money in consideration thereof, and as they took the benefit of it, worked for their own profit, and sold rights under it, they were not entitled to recover back the money so paid as money had and received by M. to their use.

Wallace Nesbitt, Q.C., and *S. D. Biggar,* for the appellants, the defendants.

W. B. Raymond, for the respondent, the plaintiff.

QUEBEC.]

TOWN OF RICHMOND v. LAFONTAINE.

Municipal corporations—Construction of waterworks — Improper construction—Notice— Use of works —Waiver—Mise en demeure — Condition precedent.

A contract for the construction and maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corporation, and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works, the corporation served a protest upon the contractors, complaining in general terms of the insufficiency and unsatisfactory construction of the works, without specifying particular defects, but made use of the

works complained of for about nine years, when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under conditions in the contract.

Held, that, after the long delay, when the contractors could not be replaced in their original position, the complaint must be deemed to have been waived by acceptance and use of the waterworks, and it would, under the circumstances, be inequitable to rescind the contract.

Held, further, that a notice specifying the particular defects to be remedied was a condition precedent to action, and that the protest in general terms was not a sufficient compliance therewith to place the contractors in default.

H. B. Brown, Q.C., and *Lawrence,* for the appellants.

Panneton, Q.C., and *Belcourt,* Q.C., for the respondents.

Exchequer Court of Canada.

[BURBIDGE, J., 14TH JUNE, 1899.

GENERAL ENGINEERING CO. OF ONTARIO v. DOMINION COTTON MILLS CO.

Patent of invention—Furnace stoker—Combination—Infringement—Motion to reopen trial—Affidavit meeting evidence produced at trial.

On the 15th October, 1892, Jones obtained a patent in Canada for alleged new and useful improvements in boiler furnaces. The distinctive feature of Jones's invention was that, instead of using a fuel chamber or magazine bowl-like in shape, such as that claimed in Worthington's United States patent, he employed an oblong trough or bath-tub shaped fuel chamber, with upwardly and outwardly inclined closed sides. This form of fuel chamber was suggested in the Worthington patent, but was not worked out by its inventor, it being his view, apparently, that several magazines or chambers bowl-like in shape could be used within the

trough-shaped chamber. The Worthington patent was not commercially successful. Jones, using an oblong or trough-shaped chamber, was the first to manufacture a mechanical stoker that was commercially successful. Between Worthington's and Jones's patents there was all the difference between failure and success.

Held, that Jones's patent was vaild.

An application was made, after the hearing and argument of the cause but before judgment, for leave to the defendants to file as part of the record certain affidavits to support the defendants' case by additional evidence in respect of a matter upon which evidence had been given by both sides. It was open to the defendants to have moved for leave for such purpose before the hearing was closed, but no leave was asked. It also appeared that the affidavits had been based upon some experiments which had not been made on behalf of the defendants until after the hearing.

Held, that the application must be refused.

Humphrey v. *The Queen,* 2 Ex. C. R. 286, and *DeKuyper* v. *VanDulken,* 3 Ex. C. R. 88, distinguished.

Osler, Q.C., *J. L. Ross,* and *C. A. Duclos,* for the plaintiffs.

D. MacMaster, Q.C., and *F. S. Maclennan,* Q.C., for the defendants.

[10TH JANUARY, 1900.

REGINA *ex rel.* AMERICAN STOKER CO. v. GENERAL ENGINEERING CO. OF ONTARIO.

Practice—Scire facias to repeal patent—Patent Act, s. 34, s.-s. 2—Expiry of foreign patent—"Cause as aforesaid"—Jurisdiction.

Upon a proceeding by *scire facias* to set aside a patent for invention because of an alleged expiry of a foreign patent under the provisions of s. 8 of the Patent Act:—

Held, that there was so much doubt as to that being one of the clauses included in the expression "for cause as aforesaid" in clause 2 of s. 34 of the Act, that the action should be dismissed.

D. MacMaster, Q.C., and *F. S. Maclennan*, Q.C., for the relators.

Osler, Q.C., and *J. L. Ross*, for the defendants.

QUEBEC ADMIRALTY DISTRICT.

[ROUTHIER, L.J., 28TH JULY, 1899.

HINE v. THE "THOMAS J. SCULLY."

Admiralty law—Towage—Salvage—Sufficiency of tender—Costs.

The steam-tug "Thomas J. Scully," of 111 tons burthen, bound from New York, U.S.A., to St. Johns, P.Q., was prosecuting her voyage off Cape Chatte, in the lower St. Lawrence, when a slight accident happened to her boiler, in consequence of which her fires had to be extinguished in order that the boiler might cool to allow the engineer to make the necessary repairs. At that time the vessel was in the ordinary channel of navigation, and the weather was fine and the sea calm. The accident happened at 8 p.m. Three hours afterwards, and before repairs could be made, the steam-ship F., of 2,407 tons burthen, bound from Maryport, G.B., to Quebec, approached the tug, and, at the request of her captain, took the tug in tow. The towage covered a distance of 230 miles, and continued for a period of thirty hours, during which neither ship was in a position of danger, nor were the crew of F. at any time in peril by reason of the services rendered to the disabled tug.

Held, that, as the services to the disabled tug were rendered under the easiest conditions, without increase of labour or delay to the F., it was clearly a towage and not a salvage service.

2. It not being a case of salvage, the officers and crew of the F. were not entitled to participate in the amount awarded for the towage, but that it belonged to the owners of the ship.

3. The defendants having paid into Court an amount sufficient to liberally compensate the plaintiff for the services rendered, they were given their proper costs against the plaintiff.

A. H. Cook, Q.C., for the plaintiff.

Pentland, Q.C., for the defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [25TH JANUARY, 1900.

RICE v. RICE.

Fraudulent conveyance—Husband and wife—Income—Gift.

An appeal by the defendants from the judgment of a Divisional Court, 31 O. R. 59, 19 Occ. N. 271, was dismissed with costs, counsel for the respondent not being called upon to argue.

E. F. B. Johnston, Q.C., and *Heighington*, for the appellants.

Aylesworth, Q.C., and *H. W. Mickle*, for the respondent.

BOYD, C.] [16TH JANUARY, 1900.

HAVEN v. HUGHES.

Contract—Mineral rights—Right to possession.

By an agreement made on the 13th January, 1897, in consideration of $1, the owner of certain lands agreed "to

lease and hereby does lease to (the plaintiff) the following described premises," mentioning them, and "hereby leases and agrees to give and convey hereby to said (plaintiff) all mineral rights on said premises, the right to quarry stone, and the right to bore for gas, with privilege to erect and bring to said premises all necessary tools, machinery, and conveniences for mining, quarrying, and boring on said premises, and to erect buildings thereon for said tools and machinery and for housing employees, and also to drain said premises and to build necessary railroad thereon."

"Said (plaintiff) also agrees if he uses said property under this agreement to take therefrom the amount of 50,000 cords of stone, and to pay therefor the sum of 25 cents per cord per United States specifications. Said (owner) hereby agrees that he will give no other party or corporation any rights on said premises for the above described purposes on or before August 1st, 1897."

"Unless said (plaintiff) utlizes said premises for said purposes on or before August 1st, 1897, this lease shall be null and void."

Held, affirming the judgment of BOYD, C., that under this agreement the plaintiff was not entitled to exclusive possession of the land, or to quarry all the stone thereon, but only to quarry 50,000 cords.

Aylesworth, Q.C., and *C. A. Moss*, for the appellant.

Osler, Q.C., and *W. M. German*, Q.C., for the respondents.

GUTHRIE v. CANADIAN PACIFIC R. W. CO.

Prescription—Right of way—Railways—Crossing.

When a line of railway severs a farm, and no crossing is provided by the company, a right of way across the line may be acquired by the owner of the farm by prescription.

A farm crossing provided by a railway company may be used by any person who after the severance becomes the owner of portions of the farm on both sides of the line of railway, and has a right of access to the crossing.

A right of way may be acquired although the dominant tenement is not contiguous to the servient tenement.

Judgment of BOYD, C., affirmed.

Wallace Nesbitt, Q.C., and *Angus MacMurchy*, for the appellants.

Guthrie, Q.C., and *Shepley*, Q.C., for the respondents.

ARMOUR, C.J.]

BUGBEE v. CLERGUE.

Foreign judgment—Action in Ontario—Defence available in foreign Court—Principal and surety—Limitation of actions—Statement of claim—Writ of summons—"Absence beyond seas"—Foreigner.

A creditor who has obtained judgment in a foreign country for the amount of his debt, may, if entitled to sue at all in this Province, sue either upon the foreign judgment or upon the original consideration.

An action upon a foreign judgment may fail if it be proved that the judgment is of such a nature that it would upon the application of the defendant be set aside in the Court in which it was recovered.

By the indorsement of his writ the plaintiff claimed upon the foreign judgment only, but in his statement of claim he set up an alternative claim upon the original consideration, a promissory note:—

Held, that it was too late to object to this at the trial, and that, as the period of limitation had not expired at the time of the issue of the writ, the plaintiff was entitled to recover, although that period had expired before the filing and delivery of the statement of claim.

Held, also, that, even if the action were treated as having been brought at the time of the filing and delivery of the statement of claim, the defence of the Statute of Limitations was of no avail, because the defendant, a foreigner, had never been within the Province, and the statute had therefore never commenced to run in his favour.

In an action against the maker of a promissory note it was alleged that he was a surety, and it was shown that by the law of the state in which the note was given a creditor could not recover against a surety without first endeavouring by legal process to recover against the principal:—

Held, that the defence of suretyship was not made out; but *semble*, that such a defence would be a matter of procedure only, and no bar to an action in this Province.

Judgment of ARMOUR, C.J., affirmed.

Riddell, Q.C., and *J. D. Falconbridge*, for the appellants.

William Macdonald, Q.C., for the respondent.

In re CANADIAN PACIFIC R. W. CO. AND CITY OF TORONTO

Landlord and tenant—Agreement for lease—Covenant to pay taxes—Evidence—Judicial discretion—Referee.

Upon a reference to settle the form of a lease, under a contract by a municipal corporation to demise land owned by it to a railway company for a long term of years with perpetual right of renewal, evidence of surrounding circumstances and the practice and usage of conveyancers is admissible to enable the Referee to decide whether the lease should contain a covenant by the lessee to pay municipal taxes.

Judgment of ARMOUR, C.J., affirmed.

Upon such a reference the Referee is entitled to exercise a judicial discretion as to the evidence to be admitted, and he should not be ordered to admit, subject to objection, all evidence which may be tendered.

Aylesworth, Q.C., *Angus MacMurchy*, and *Shirley Denison*, for the appellants.

Robinson, Q.C., and *Fullerton*, Q.C., for the respondents.

ROSE, J.]

BREWER v. CONGER.

Lease—Renewal—Option—Mortgage—Redemption.

Under a covenant in a lease that the lessors would, at the expiration of the term thereby granted, grant another lease, "provided the said lessee . . . should desire to take a further lease of said premises," no notice or demand by the lessee is necessary. The existence in fact of a desire for the further lease is all that is essential, and that desire may be indicated by conduct and circumstances.

A lease of land, subject to two mortgages, contained a covenant by the lessor and the second mortgagee with the lessee, that the lessee might if he desired to do so redeem the first mortgage, and that in that case the sum paid for redemption should be a first charge on the land:—

Held, that the second mortgagee's right to redeem the first mortgage, after its acquisition by the lessee, was not taken away.

Judgment of ROSE, J., affirmed.

Aylesworth, Q.C., for the appellant.

Clute, Q.C., for the respondent.

ROBERTSON, J.]

LAZIER v. ROBERTSON.

Settlement—Contingent or vested estate—Children.

Held, affirming the judgment of ROBERTSON, J., 30 O. R. 517, 19 Occ. N. 171, that under the settlement in question the child who died before the period for conveying took a vested interest.

Shepley, Q.C., and *H. W. Mickle*, for the appellant.

W. H. Blake, for the respondent.

ROMBOUGH v. BALCH.

GREEN v. NEW YORK AND OTTAWA R. W. CO.

Master and servant—Negligence—Damages—Death of child—Railway—Want of lock at switch.

The omission to have a lock at a railway switch, situate near a much travelled highway, is such negligence as to make those having control of the railway liable in damages for the death of their servants resulting from the switch becoming misplaced.

A parent cannot recover damages for the death of his child unless there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit to the parent in the future, capable of being estimated.

Judgment of ROBERTSON, J., affirmed.

W. Cassels, Q.C., and *A. W. Anglin*, for the appellants.

Aylesworth, Q.C., and *C. H. Cline*, for the respondent Rombough.

G. I. Gogo and *H. Beattie*, for the respondent Green.

MACMAHON, J.]

COUNTY OF YORK v. ROLLS.

Water and watercourses—Flood—Change in course of stream.

When, owing to an extraordinary flood, a stream suddenly changes its course and washes away part of the land of a riparian proprietor, he is entitled, at any time before a prescriptive right, or right by estoppel, to keep the stream in its new channel is acquired against him, to fill in the places washed away and to turn the stream back to its original channel.

Judgment of MACMAHON, J., affirmed.

C. C. Robinson, for the appellants.

William Cook, for the respondent Rolls.

Ludwig, for the respondent Hunter.

STREET, J.]

In re TOWN OF CORNWALL AND CORNWALL WATER-WORKS CO.

Municipal corporations—Waterworks company—Arbitration and award—Payment into court—Interest.

Where a municipal corporation, taking over the works of a waterworks company under the statutory arbitration procedure, wishes to take advantage of the provisions of ss. 445 and 446 of the Municipal Act, it must pay into Court the amount awarded, with interest to the date of payment in and six months' interest in advance.

Judgment of STREET, J., 30 O. R. 81, 19 Occ. N. 36, affirmed.

S. H. Blake, Q.C., and *Leitch*, Q.C., for the appellants.

Aylesworth, Q.C., and *C. H. Cline*, for the respondents the waterworks company.

Bruce, Q.C., for the respondents the mortgagees.

MEREDITH, J.]

KIRBY v. BANGS.

Will—Construction—Contingent or vested interest—Legacy.

A testator devised certain property to trustees to hold it in trust for twenty years after his decease; during that time to pay the income to his widow and children, naming them, in certain shares; and after the expiration of twenty years to sell and to divide the proceeds among his "said children" in certain shares.

He also devised certain other property to the trustees upon trust to sell from time to time as they in the exercise of "full discretion" should think fit, and to pay the income to his widow for life, and upon her decease to divide the corpus among his children, naming them, in certain shares.

Held, affirming the judgment of MEREDITH, J., that the children took vested interests.

Osler, Q.C., for the appellants.

A. J. Boyd, for the official guardian.

W. B. Raymond, for the executors.

Aylesworth, Q.C., for the respondents.

BOARD OF C. C. JUDGES.]

In re LONDON STREET RAILWAY ASSESSMENT.

Assessment and taxes—Street railway—Rails, poles, and wires—Bridges—Road-bed—Adding items on appeal.

Although a street railway is operated as a continuous stystem through all the wards of a city, the portion of the rails, poles, and wires in each ward must be assessed in that ward, and in making the assessment the rails, poles, and wires must be treated as so much dead material, and not as necessary portions of a going concern.

Bridges built and used by a street railway as part of their system are subject to assessment, but must be assessed in the same way as the rails, poles, and wires.

Consumers Gas Co. v. *City of Toronto*, 27 S. C. R. 453, *In re Bell Telephone Company Assessment*, 25 A. R. 351, and *In re Toronto Railway Company Assessment*, 25 A. R. 135, applied.

Upon an appeal to a board of County Court Judges from the Court of Revision coming on for hearing, the board, at the request of the city corporation, and without any previous notice or assessment or application to the Court of Revision, added to the items of assessable property of a railway company, a certain amount as to the value of the portion of the streets of the city "occupied" by the company.

Held, that the board of County Court Judges had no jurisdiction to make this addition, the amendment made by s. 5 of 62 V. c. 27 not then being in force.

Semble, that the railway company were not liable to assessment in respect of the portions of the streets occupied by them.

Judgment of the board of County Court Judges reversed.

Hellmuth, for the appellants.

T. G. Meredith, for the respondents.

[Drainage Referee.]

TOWNSHIPS OF ADELAIDE AND WARWICK v. TOWNSHIP OF METCALFE.

Drainage Act—Amendment of engineer's report—Jurisdiction of Referee—Appeal—Court of Appeal—R. S. O. c. 226, ss. 89, 90.

The Drainage Referee cannot, under s. 89 of the Drainage Act, R. S. O. c. 226, upon the admission of the initiating township that the report appealed from is defective, refer it back, against the wishes of the appealing townships, to the engineer for amendment. That course can be adopted, if at all, only with the engineer's consent and upon evidence given.

Judgment of the Drainage Referee reversed.

An order assuming to refer back a report is not an interlocutory order within the meaning of s. 90 of the Drainage Act, R. S. O. c. 226, and an appeal lies to the Court of Appeal against it.

Aylesworth, Q.C., for the appellants.

Folinsbee, for the respondents.

HIGH COURT OF JUSTICE.

[Armour, C.J., Falconbridge, J., Street, J., 19th December, 1899.

HARPER v. TORONTO TYPE FOUNDRY CO.

Replevin—Indemnity of defendant—Replevin bond—Rule 1074.

Rule 1074, dealing with the question of indemnity of the defendant in replevin proceedings, is the statute 48 Vict.

c. 13, s. 8, imported into the Rules, and does not give an independent cause of action, merely adding another condition to the replevin bond required to be taken by the sheriff.

Poussette, Q.C., for the plaintiff.

Ryckman, for the defendants.

[29TH JANUARY, 1900.

STANLEY v. LITT.

Interlocutory judgment—Assessment of damages—Slander—Rule 578.

The action was commenced by writ of summons indorsed —"The plaintiff's claim is for damages for slander." No appearance having been entered, the plaintiff signed interlocutory judgment against the defendant according to form 146, and set the cause down for assessment of damages at a sittings of the High Court.

Held, that there being nothing to shew that the action was brought under R. S. O. c. 68, s. 5, it must be treated as an ordinary action of slander; Rule 578 therefore applied to the case; the delivery of a statement of claim was unnecessary; and the plaintiff had no right to sign interlocutory judgment and have the damages assessed as he proposed.

Origin of Rule 578.

R. S. Robertson, for the plaintiff.

R. T. Harding, for the defendant.

[31ST JANUARY, 1900.

RAE v. RAE.

Alimony—Desertion—Offer to receive wife back—Bona fides.

Decision of MEREDITH, C.J., 19 Occ. N. 34, affirmed.

Holman, Q.C., for the defendant.

Aylesworth, Q.C., for the plaintiff.

[12TH FEBRUARY, 1900.

TRUSTS AND GUARANTEE CO. v. HART.

Gift—Parent and child—Fiduciary relationship—Influence—Presumption—Onus—Absence of independent advice.

For fifteen years before his father's death the defendant managed his father's shop and his business generally, and did all his banking business under a power of attorney. For eleven years before the death the defendant and his wife and children all lived with the father in a dwelling above the shop. The fullest authority was given to the son and the fullest trust reposed in him. After the death of the father at the age of 78, in September, 1898, the son claimed a sum of $20,000, represented by a bank deposit receipt dated 3rd June, 1898, payable to himself, which he alleged was a gift from his father to himself or his children. He obtained the deposit receipt by drawing a cheque for the amount in his own favour upon his father's account and signing it with his father's name, by virtue of the power of attorney. The father died intestate, leaving the defendant and two other children. The sum of $20,000 represented more than one-fourth of the value of the estate. The trial Judge found that the $20,000 was a gift to the defendant's children, and ordered it into Court for their benefit.

Held, reversing that judgment, that, on grounds of public policy, the presumption was that the gift, even though freely made, was the effect of the influence induced by the confidential relationship which existed, and the onus was on the defendant to show that his father had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances; and nothing of the kind was shewn in this case.

Morley v. *Loughoran*, [1893] 1 Ch. 736, *Rhodes* v. *Bate*, L. R. 1 Ch. 252, and *Liles* v. *Terry*, [1895] 2 Q. B. 679, followed.

The rule is not confined to the case of trustee and cestui que trust, but has been applied to every case where confi-

dence has been reposed, and the fact that the benefit obtained has not been so obtained for the personal benefit of the person in whom the confidence was reposed, does not affect the application of the principle

Evidence was given to the effect that the deposit receipt was taken in the defendant's name in lieu of a promissory note made by the father in 1895, which itself was a renewal of an earlier note made in favour of the son as a settlement for his children, and that both notes had been destroyed.

Held, that the notes, if they existed at all for the purpose alleged, were incomplete gifts, not binding upon the deceased or his estate. The hand by which the transfer of the $20,000 was effected was that of the son, and the ratification rested almost wholly upon the evidence of the son and his wife, who kept the matter a secret until after the death. The father at the time the transaction was carried out in June, 1898, was not legally bound to pay his note; he was ill and old; and the only adviser to whom he had recourse was the defendant. Therefore that time, and not the time when the notes were said to have been given, was the time at which the gift must be taken to have been made, if at all, and at which the effect of the lack of independent advice was to be considered.

Osler, Q.C., and *E. M. Young*, for the plaintiffs.

Aylesworth, Q.C., and *C. H. Widdifield*, for the defendant George D. Hart and the infant defendants.

R. Wardrop, for the defendants the Standard Bank of Canada.

[Boyd, C., Ferguson, J., Robertson, J., 8th January, 1900.

GLOVER v. SOUTHERN LOAN CO.

Execution creditors—Mortgage sale—Application of surplus—Lien notes.

G. B. was owner of a farm, subject to mortgages to the defendant company, and also subject to a lien for the price of a machine purchased from the Sawyer-Massey Company.

The machine had been bought by T., and promissory notes were given by T., and R. B. as surety for T.

R. B. then owned part of the farm, and executed a document giving a lien on his part of the farm for the price of the machine.

The plaintiffs recovered judgment against G. B., and placed an execution against the lands in the sheriff's hands, which bound G. B.'s estate and interest in the lands as the then sole owner, he having acquired R. B.'s share. After this the defendant company exercised the power of sale contained in their mortgages and sold the farm for enough to pay their mortgages and the lien charged on the land. The lien was thus satisfied out of the proceeds of the sale, and an assignment was taken, at the instance of the solicitor for the mortgagees, both of the lien paper and the notes which it guaranteed, to one N., who was an execution creditor for a small amount subsequent to the plaintiffs' execution. This assignment was made on the 17th February, 1894, to N. absolutely by the Sawyer-Massey Company, and the notes were held by N. under her assignment until the 18th December, 1898, when she brought action upon them, which action turned out fruitless, as both makers were worthless. It was proved in this action that had T. been promptly proceeded against in 1895, when the notes had become payable, the amount due upon the notes could have been recovered, and he was the person primarily and properly liable to pay, as he bought and had the machine.

Held, that the duty of the mortgagees, on satisfying the lien for the machine out of the proceeds of the sale, was to get in the notes forming part of the security for the machine; that the notes were not paid by the application of the proceeds of the sale in discharge of the lien, because T. was the principal debtor in respect to them, and the land was pledged merely as security for him; that the mortgagees, being aware of the plaintiffs' execution in the sheriff's hands, should have secured the notes for the execution creditors; that, inasmuch as, through their inaction, the value of the

notes had been lost to the latter, they were responsible to the plaintiffs in the amount of them.

Aylesworth, Q.C., and *J. Crawford*, for the plaintiffs.

Farley, Q.C., for the defendants the Southern Loan Company.

W. A. Wilson, for the defendant Ramsdell.

[MEREDITH, C.J., ROSE, J., 15TH JANUARY, 1900.

In re FRASER v. OBERNDORFER.

Division Court—Removal of plaint into High Court—Discretion of High Court Judge—Refusal of Divisional Court to interfere—Res judicata.

After a trial and judgment in a Division Court as to the right of a landlord to recover a month's rent under a lease, another action was brought for three months' subsequent rent, whereupon the defendant applied to a Judge of the High Court for an order in the nature of a *certiorari*, which was refused, on the ground that though the case might be of importance as affecting cases of a similar nature, that was not of itself sufficient ground for removing the action into the High Court, no difficult questions of law or fact appearing to be involved.

On appeal to a Divisional Court the judgment was affirmed, the Court holding that the granting of the order being left to the discretion of the Judge, and he having exercised it, the Court could not interfere; and moreover by the judgment of the Division Court in the first action the matter was *res judicata*.

E. Taylour English, for the defendant.

A. G. Slaght, for the plaintiff.

[ARMOUR, C.J., FALCONBRIDGE, J., 9TH JANUARY, 1900.

GREENWAY v. GARDINER.

Contract—Furnishing heating apparatus—Guaranty as to degree of heat to be produced—Construction of.

On the 7th May, 1898, the plaintiff entered into a contract in writing with the defendant to construct and com-

plete by the 31st August, 1898, a hot-water heating apparatus in a house being erected for the defendant, for which he was to be paid $316, eighty per cent. thereof as the work progressed and the balance on the completion thereof, and he thereby also agreed that the apparatus would give seventy degrees of heat when the weather was ten degrees below zero.

The apparatus was constructed and completed by the plaintiff, but wholly failed to give the promised heat.

Therefore, on the 8th December, 1898, the plaintiff entered into a contract with the defendant, for the purpose of remedying, if possible, his breach of contract, for the consideration of the further sum of $75, to make certain changes; and thereby guaranteed that the apparatus would heat the rooms in which the radiators were changed to a temperature of seventy degrees when the thermometer registered ten degrees below zero outside; the $75 to be paid at such time as the apparatus had been tested under the above conditions, or, in the event of the temperature outside not marking ten degrees below zero before the 1st March, 1899, the $75 to be paid at that date.

Held, that it could not be reasonably contended that if the thermometer never went down to ten degrees below zero before the 1st March, 1899, the plaintiff would be entitled to the $75, although it were clearly proved that, according to the proper construction of the guaranty, the apparatus would not heat the rooms in which the change was made to a temperature of seventy degrees, even when the thermometer registered less than ten degrees below zero.

Guaranties such as these are to be construed reasonably, according to the intent of the parties, and the more strongly against those giving them: *Parkhurst* v. *Smith*, Willes 327; *Hargreave* v. *Smee*, 6 Bing. 244; *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256.

The proper and reasonable construction to be placed upon these guaranties was that the heating apparatus, if fed and managed in the ordinary way, would give seventy degrees of heat when the weather was ten degrees below zero, and would heat the rooms in which the radiators were

changed to a temperature of seventy degrees when the thermometer registered ten degrees below zero outside.

The evidence shewed beyond reasonable doubt that the apparatus did not answer and was incapable of being made to answer these guaranties.

Hellmuth, for the plaintiff.

J. M. McEvoy, for the defendant.

[BOYD, C., 18TH DECEMBER, 1899.

ATTORNEY-GENERAL FOR ONTARIO v. NEWMAN.

Revenue —Succession duties—Money deposited in Ontario banks by a foreigner.

The Succession Duty Act, R. S. O. c. 24, contemplates a site or locality being given to all kinds of personal property, and that the domicil of the deceased owner is not to be regarded.

A resident of the United States deposited moneys in certain banks in Ontario at interest, and took deposit receipts therefor.

Held, on his death in the States, that the moneys were liable to the Ontario succession duties.

Shepley, Q.C., and *W. E. Middleton,* for the plaintiff.

Aylesworth, Q.C., and *Rodd,* for the defendants.

[21ST DECEMBER, 1899.

MITCHELL v. TOWN OF PEMBROKE.

Police magistrate—Police office— Accommodation — Stationery — Private office—Municipal corporations.

In an action by a police magistrate for a town, who was also a justice of the peace for the county in which the town was situated, to compel the corporation of the town to establish a police office, as required by statute, and to reimburse him for rents paid for premises used as such, and for stationery, etc.:—

Held, that the defendants were not called upon to furnish facilities for the transaction of business not strictly appertaining to the office of police magistrate for the town, such as matters arising in the county, outside the town limits.

Held, also, that it was not needful that the police office should be a separate building; that the allocation of a suitable room or chamber in any building belonging to the municipality, such as the council chamber in the town hall, although only up to four o'clock in the afternoon, was sufficient.

Held, also, following *Newcombe* v. *County of Oxford*, 28 O. R. 442, that he was entitled to stationery.

Semble, that a police magistrate has no right to claim a private office in addition to a public one.

Regina v. *Lee*, 15 O. R. at p. 359, referred to.

J. R. Metcalf, for the plaintiff.

J. J. O'Meara, for the defendants.

[MEREDITH, J., 8TH FEBRUARY, 1900.

TURTLE v. TOWNSHIP OF EUPHEMIA.

Ditches and Watercourses Act—Award—Engineer—Appointment—Revocation—Notice—Jurisdiction—Estoppel—Appeal.

By s. 4 (1) of the Ditches and Watercourses Act, R. S. O. c. 285, it is provided that "every municipal council shall name and appoint by by-law (Form A) one person to be the engineer to carry out the provisions of this Act, and such engineer shall be and continue an officer of such corporation until his appointment is revoked by by-law (of which he shall have notice) and another engineer is appointed in his stead, who shall have authority to commence proceedings under this Act or to continue such work as may have been already undertaken."

The defendants' municipal council appointed R. such engineer, in manner provided by the Act, in April, 1895, and he accepted the office and acted and continued in it. In 1898 they, without any notice to R., and without any

by-law expressly revoking his appointment, passed a by-law purporting to appoint S. as such engineer. In both appointments the form of by-law prescribed by the Act was used; the latter by-law in no way referred to the former or to R.

Held, that the prior appointment had not been revoked; that S. did not become "the engineer;" and that an award purporting to be made by him as such engineer under the Act was invalid.

S. was not *de jure* the engineer, because R.'s appointment had not been revoked by by-law, either with or without notice to him; and *semble,* that the notice required was of intention to revoke.

The defendants could not assert that S. was *de facto* the engineer, for he had not the reputation of being the engineer.

Held, also, even supposing that consent could confer jurisdiction, or that the plaintiffs might waive or be estopped from urging an objection to S.'s jurisdiction, that there was no reasonable evidence of any such consent, waiver, or estoppel; for the plaintiffs' requisition called for "the engineer," and it was the act of the township clerk which called in S. instead of R.; the plaintiffs did not know who was the engineer; they had heard that S. had been appointed, but neither of them knew that R.'s appointment had not been revoked by by-law of which he had had notice. The point was raised upon an appeal against the award and was overruled; but, as it went to the root of the jurisdiction of the whole proceedings, including such appeal, there was nothing in such proceedings which could prevent a consideration of the question now.

T. G. Meredith and *Dromgole,* for the plaintiffs.

W. J. Hanna, for the defendants.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 18TH DECEMBER, 1899.

REEKIE v. McNEIL.

County Court appeal—Setting down—Time—Certificate of Judge—Condition precedent—Jurisdiction to hear appeal.

An application by the plaintiff to strike out of the list the defendant's appeal from the judgment of a County Court as too late.

Held, that until the Judge has certified under his hand to the proper officer of the High Court, as provided by ss. 55 and 56 of R. S. O. c. 55, an appeal cannot be set down for hearing: *McCarron* v. *Metropolitan Life Ins. Co.*, 19 Occ. N. 230; *Gilmor* v. *McPhail*, 16 P. R. 151.

After the time limited by the statute for setting down has expired, there is no jurisdiction to hear the appeal.

If the Judge neglects or refuses to certify under the above-mentioned sections in time to enable the appellant to set down the appeal within the time limited by the statute, his certificate cannot be dispensed with, nor the time enlarged for granting it.

The certifying in time to enable the appeal to be set down under these sections is a condition precedent to the jurisdiction of this Court to hear the appeal, and being such cannot be dispensed with.

The appeal was struck out with costs.

R. U. Macpherson, for the plaintiff.

H. E. Rose, for the defendant.

[30TH JANUARY, 1900.

TORRANCE v. CRATCHLEY.

Mechanics liens—Twenty per cent. reserve—Payment before thirty days—R. S. O. c. 153, s. 11.

All work on a building was finished on the 11th August, 1899. On the 14th August, 1899, four workmen, whose wages remained unpaid, and who were entitled to liens for the amount, threatened to register their liens unless paid at once. The owner thereupon paid the amount; and afterwards treated the same as deducted from the twenty per cent. retained under R. S. O. c. 153, s. 11, and proceedings having been commenced, the owner paid the balance of the twenty per cent. into Court. The balance so paid in, however, was more than sufficient to pay all remaining wage-earners in full.

Held, that, under the above circumstances, the owner was justified in making the payments out of the twenty per cent. before the expiration of the thirty days mentioned in the Act, and could not be required to pay the sum over again into Court. By making such a payment, however, the owner takes the responsibility of showing that he has placed the other lien-holders in no worse position by his action, as had been shown in the present case.

Ritchie, Q.C., for the appellant, the owner.

John Douglas, for the plaintiffs and certain other lien-holders.

Rowan and *F. C. Cooke*, for other lien-holders.

[5TH FEBRUARY, 1900.

In re MITCHELL AND PIONEER STEAM NAVIGATION CO.

District Courts—Jurisdiction of Judges of—Local Judges of High Court—Vendors and Purchasers Act.

An appeal by the purchasers from an order of the Judge of the District Court for the district of Rainy River, made upon a motion under the Vendors and Purchasers Act, R. S.

O. c. 134, declaring that if the vendors conveyed under the contract in question "subject to mining rights only," the purchasers were bound to accept the title.

Held, that the Judges of the District Courts appointed under the provisions of R. S. O. c. 109 are Judges of the High Court for the purposes of their jurisdiction in actions in the High Court, and may be styled "local Judges of the High Court," but that nowhere in any statute or Rule is any power or authority given to such Judges to deal with applications under the Vendors and Purchasers Act, or under the Land Titles Act; and, therefore, in this case the Judge had acted without jurisdiction.

The appeal was allowed, but, as the proceedings were taken on the consent of both parties, no costs were awarded.

C. C. Robinson, for the appellants.

W. N. Ferguson, for the vendors.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 22ND FEBRUARY, 1900.

LEES v. OTTAWA AND NEW YORK R. W. CO.

County Court appeal—Setting down—Time—Copies of pleadings.

An appeal by the defendants from the judgment of the County Court of Carleton in favour of the plaintiff.

At the hearing of the appeal the plaintiff raised the objection that the original pleadings were not certified by the Judge of the Court below, but only copies of them, and the further objection that the appeal was set down for too early a date, it having been set down for a sittings of a Divisional Court which began less than thirty days after the decision complained of.

By s. 57 of the County Courts Act, R. S. O. c. 55, "the appeal shall be set down for argument at the first sittings of a Divisional Court of the High Court of Justice which commences after the expiration of one month from the judgment, order, or decision complained of."

By Rule 795, "the appeal shall be set down to be heard at latest two clear days before the first sittings of a Divisional

Court which commences after the expiration of 30 days from the decision complained of."

By Rule 793, the papers to be certified to the proper officer of the High Court under s. 55 of the County Courts Act, shall include "(*a*) the original pleadings."

Section 55 merely says, "the pleadings."

Held, that it is the Rule, and not the statute, which requires the original pleadings to be certified, and the Court may and does dispense, in a proper case, with the fulfillment of the requirements of the Rules, or permits something to be done *nunc pro tunc*.

Held, also, that the provisions of s. 57 and Rule 795, as to setting down, were designed to prevent an appeal being unduly delayed, and are to be read as providing that the setting down is to be for a sittings not later than the first sittings after thirty days from the decision complained of.

Both objections overruled.

W. A. D. Lees, the plaintiff, in person.

Curle, for the defendants.

[FALCONBRIDGE, J., 27TH DECEMBER, 1899.

COYLE v. COYLE.

Summary judgment—Rule 616—Dismissal of action—Admissions on examination for discovery—Disclosing case.

The Court or a Judge has power, in a proper case, to dismiss the action on an application under Rule 616.

In an action to recover a debt alleged to have been due by the defendant to the plaintiff's deceased father, the claim for which was assigned to the plaintiff by her mother, as administratrix of the father's estate, the plaintiff, on being examined for discovery, admitted that she had no personal knowledge on which she could succeed, but was relying upon an entry made in a book of her father, that he had lent the defendant money on a certain day.

Held, that she could not be obliged to tell what evidence she was going to use nor what witnesses she meant to call;

she could have been asked if she had disclosed her whole case; but, not having been asked that, it was open for her to say that she had evidence of facts outside of those within her own knowledge which might tend to establish her case; and the action should not be dismissed.

O'Rourke, for the plaintiff.

Mikel, for the defendant.

In the County Court of the County of Perth.

[BARRON, Co.J., 24TH JANUARY, 1900.

MILLER v. THOMPSON.

Contract — Trade agreement — Breach of covenant — Parties — Directors of association — Covenantees — Signature — Misunderstanding — Consideration — Restraint of trade — Public policy — Liquidated damages.

The defendant, with others, by a writing, covenanted separately with the plaintiffs, the board of directors of the Cheese and Butter Makers' Association of Western Ontario, that if he should at any time thereafter, within the Province of Ontario, for the space of three years, violate the stipulations mentioned in the agreement, by directly or indirectly becoming bound as a cheese or butter maker to make good to his employer any sum of money lost to him by reason of the inferior quality of the cheese made by him, except so far as such inferior quality may have been caused by his gross negligence, he should pay to the treasurer of the board $200 as liquidated damages, which should become part of the funds of the association.

This covenant was entered into for the purpose of preventing cheese makers from making agreements with the owners of cheese factories to become liable for the quality of the product even in the case of its inferiority being due to the character of the milk supplied.

The defendant entered into an agreement in violation of his covenant.

Held, that the covenant having been entered into with the plaintiffs, they had a status to sue for the breach, without joining the other covenantors, although the agreement was mutually advantageous.

2. That the evidence did not support the defendant's contention that his signature was obtained by misrepresenting or misreading the document to him, so that he did not understand what he was signing.

3. That there was a good consideration for the covenant, in the benefit to the defendant, although no consideration was mentioned in the document.

4. That the agreement was not in restraint of trade,
5. That the $200 mentioned in the agreement was to be regarded not as a penalty but as liquidated damages.

This action was brought to recover $200 under the circumstances mentioned in the judgment, and was tried in the County Court without a jury.

Idington, Q.C., for the plaintiffs.

J. G. Wallace, for the defendant.

BARRON, CO.J.—This is an action to recover, by way of liquidated damages, the sum of $200 for breach of covenant contained in an agreement dated the 16th July, 1898, whereby the defendant with others covenanted separately with the board of directors of the Cheese and Butter Makers' Association of Western Ontario, that if he should at any time thereafter, within the Province of Ontario, for the space of three years, violate the stipulations mentioned in the agreement, by directly or indirectly becoming bound as cheese or butter maker to make good to his employer any sum of money lost to him by reason of the inferior quality of the cheese made by him, except so far as such inferior quality may have been caused by his gross negligence, then he should immediately pay to the treasurer of the said board the sum of $200 as liquidated damages, which said sum of $200 should become part of the funds of the association.

It transpired in the course of the evidence that in some localities in Ontario cheese makers, in competing for employment, have been induced to make agreements with factories whereby they became liable for the quality of the product of the factory, even when the quality, if poor, is solely due to the patrons furnishing poor, thin, dirty, or even turnipy milk. In fact some of the witnesses for the defence did not pretend to question this practice. On the contrary, they appeared to think there was not only nothing improper in it, but that it was a benefit to all parties concerned. They replied that the cheese maker when he discovered such milk might and ought to return it to the patron who brought or sent it to the factory. This is quite so, for each patron's milk is or should be tested as it enters the factory; but in

practice it has been found that the right and in fact the duty of the cheese maker to refuse such milk is almost universally neglected. To do so offends and often insults the patron whose milk is condemned. The latter resents the offence and pretends it reflects upon his honour, and the cheese maker, whose further employment instantly becomes precarious, and in fact is sometimes discontinued, becomes the subject of his anger and revenge. This in fact was said to have occurred in one case at least in the county of Perth. Farmers are no more honest than any other class of the community, and their thinking or believing that they are does not make them so. It is not impossible to believe that amongst the number of patrons one or more may be negligent in the care of his cans; or the factory buildings and surroundings, through no fault of the cheese maker, may not be in a fit condition for making cheese; or a patron may feed cheap feed or turnip feed, with the certain result of very inferior milk. A complaint by the cheese maker means attracting the attention of the patrons generally to the real offender; it means subjecting him to strong comment by his neighbours, and probably severe but just censure at the hands of the patrons who honestly strive to furnish good milk. It means that each honest patron is hurt by the dishonest patron, and it is not difficult to perceive that a patron charged with this offence, if guilty, will deny it, and his insistence of his innocence is made all the more forcible by his consciousness of guilt. Nor is it difficult to see that such a patron, having it in his power, could and would make it very uncomfortable for the cheese maker. In practice the courageous cheese maker, who strictly does his duty, may loose his livelihood; so it happens that to save the risk of this the cheese maker remains dumb, the poor milk goes through, and the bad cheese comes.

What next happens? The buyer on the board comes afterwards to inspect the cheese at this factory; he discovers its defects, and at once refuses it; the cheese maker becomes alarmed, not only his livelihood, but his reputation, is at stake. He is responsible to his employers and must make good the loss, even though not he but the dishonest patron was to blame in the first instance; and so the cheese maker

stands in with the buyer and himself makes good the difference in price between what the buyer then offers and what he has bid upon the board, and the cheese is taken away.

The honest patrons of the factory are none the wiser, but the dishonest patron is encouraged in his carelessness or negligence or dishonesty, whichever it is.

What further follows? This factory begins to get a bad name, its cheese commands less price, but what is more serious than all, perhaps, is that in the competitive markets of the world its cheese impairs the value of a national export; all because, in the first place, of the fault of the patron who is negligent or careless or dishonest.

This then is the condition of things that induced the association represented by the plaintiffs to secure at their own expense the signatures of over two hundred makers to the agreement in question, and I find that the defendant was one of the two hundred. I also find, if it is necessary that I should so find, that defendant had notice of the signing of this agreement by two hundred cheese makers, and that, in violation of his compact, he made an agreement with the Norwich Junction Cheese Factory, within three years from the date of the agreement first named, which fact is confirmed by the written admission of the defendant filed as an exhibit.

The defendant struggled hard to bring his signature to the agreement sued on within the principle laid down in *Foster* v. *Mackinnon*, L. R. 4 C. P. 709, but I think he failed.

Mr. Wallace, while contesting the facts, seemed to rely principally upon the law applicable to the case set up by the plaintiffs.

His first objection was that the plaintiffs were not the proper persons to bring this action, inasmuch as others were beneficially interested in the result, and they too therefore should have been joined as party plaintiffs; that each one of the two hundred signers of the agreement sued on should have been a party plaintiff, because the agreement in question was mutually advantageous. I think the agreement in question is mutually advantageous, but each one of the subscribers to it (one of whom is the defendant) has selected the plaintiffs

to whom to give their undertaking, just as was done in *Schraeder* v. *Lillis*, 10 O. R. 358. It would be strange indeed if, having covenanted with a plaintiff, a defendant could afterwards defeat his own covenant by declaring the covenantee not the proper party to sue on the covenant: see *Chesterfield and Mid. Silkstone Colliery Company* v. *Hawkins*, 3 H. & C. 677. If I know the practice, it is that the defendant should have raised by his defence the point that additional parties were necessary. This has not been done: *Lydall* v. *Martinson*, 5 Ch. D. 780; *Cornell* v. *Smith*, 14 P. R. 275. Then the plaintiffs are the representatives of the board of directors of the Cheese and Butter Makers' Association of Western Ontario; in fact are themselves the board of directors. At most, the plaintiffs should have defined their representative character, but this irregularity, if such it was, was waived by the appearance, and any way it was fully set up in the statement of claim: *McNab* v. *Macdonnell*, 15 P. R. 14; *Aikins* v. *Dominion Live Stock Association*, 17 P. R. 303.

Next it is said that the defendant did not know what he was signing when he signed the agreement sued on, and that he should be protected on the authority of *Foster* v. *Mackinnon*, L. R. 4 C. P. 709. Well, he confesses he read it over the following Sunday and yet made no complaint or remonstrance afterwards; nor did he take the position he now does until after this action was begun. He did not take it when visited by Mr. Goodhand, Mr. Johnson, and Mr. Bright on the 23rd or the 30th November following the date of the agreement. On the contrary, his whole action shows that he abided by the agreement, and that he professed to comply with it is shown by his assertion in the presence of these gentlemen, that he had not signed the Norwich contract, which latter statement is now shown to be untrue by his written admission to the contrary.

I cannot recall where I read it, but I remember the effect of the language of Mr. Justice Street; it was that a Judge must be convinced beyond the peradventure of a doubt before destroying the effect of a signature to a writing which a party was capable of reading, when he claims that he misunderstood it or that it was misread to him. I should dis-

credit the defendant's present contention even if his evidence stood alone, but it is met by counter-evidence and is disproved by his subsequent silence, and his own statement of what he said to McKee when he told the latter he could not sign the Norwich contract. The statement was that there was something going on, and if they got two hundred names he could not sign the Norwich contract, and if they didn't get the two hundred names he could sign the Norwich contract. These words were spoken by the defendant to Mr. McKee in answer to the latter's request that if he should contract to be responsible for the cheese. If in his conversation with Mr. McKee he knew the effect of the agreement with the plaintiffs and abided by it and said nothing against it, did not repudiate it, then I think it does not lie in his mouth to say that he is to be excused from signing it on the ground that he misunderstood it or that it was misread to him.

Then Mr. Wallace says that no notice was conveyed to the defendant of two hundred names being obtained to the document in question. I doubt if in law such notice was necessary. If one says, "I bind myself not to do a thing, if two hundred others bind themselves in like manner," it may be that before he attempts to violate his compact he should convince himself that two hundred have not also bound themselves in like manner. The defendant makes a compact against doing a certain thing upon a certain condition: the negative act is not upon notice of the happening of the condition, but upon the condition itself arising. This is the defendant's position, for the fact is and was when he broke his compact that two hundred had signed it. But apart from this, he was in truth told of this, and when told sought to escape the dilemma in which he had placed himself by stating that which his written admission now stamps as being untrue.

Mr. Wallace says that the notice of the two hundred having signed was not conveyed to the defendant until the 30th November. The Norwich contract was signed on the 26th November. Mr. Goodhand says that when he saw the defendant it was "the 23rd of November, I am pretty certain." However, be that as it may, both he and Mr. Johnson state

that at the time when they saw the defendant, be it one day or the other, the latter said he had not then signed the Norwich contract. And what does the defendant say as to this conversation? When asked the question as to his signing the Norwich contract he replied "he didn't know that he had," "that he had no reason not to," and to Goodhand's remark that "if he had, it would cost him $200," he replied "no one could get $200 out of him, because he didn't have it." Now, what did he mean, unless to convey the idea to Goodhand and to Johnson that at this time he had not signed the Norwich contract? It is quite true that in the witness box he says that at this time he had in fact signed the Norwich contract. If what he now says be true, then on his own confession he was deceiving Goodhand and Johnson and withholding from them the truth; and he has no one to blame but himself if he is held to the facts as given by himself to Goodhand and Johnson, if the point has really any important effect upon the result.

In the next place it is suggested that there is no consideration, or at least no sufficient consideration. Now all I have to find is that there was a legal consideration, and it then becomes sufficient if it is of any value, whether it be adequate or inadequate: *Graveley* v. *Barnhard*, L. R. 18 Eq. 518. So fixed in law is this principle that in *Roussillon* v. *Roussillon*, 14 Ch. D. 880, eminent counsel, in the state of the authorities, declined to attack it. And in *Wicher* v. *Darling*, 9 O. R. 311, a covenant was held binding upon the covenantor notwithstanding that the consideration for it might have been inadequate. I am not sure whether Mr. Wallace's point was not that the agreement contained no express statement of the consideration. If this was his contention, the answer is that though no consideration be cited the Court can infer consideration, and on this point the authorities are all one way: *Mitchell* v. *Reynolds*, 1 P. Wms. 181; *Davis* v. *Mason*, 5 T. R. 118. There is then a consideration. I do not hesitate a minute in finding that any agremeent having for its object the saddling of a fault on the right man and relieving the innocent, is based upon a good sound legal as well as moral consideration. The state of things above recited is shown to have existed. It is bad enough for the

patron to escape the evil consequences of his own carelessness, negligence, or dishonesty, but it is worse than bad when it induces the cheese maker to become dishonest by covering up a fault in which the patron is the principal and he himself the accomplice, when he divides up with the buyer to escape detection. Both are guilty, because the one commits the offence and the other suppresses it. I do not think it is any answer to say that it was the duty of the cheese maker, under the state of things causing the agreement, to return to the offending patron his milk. The state of things covered by the recitals unquestionably existed to a greater or to a less extent, and it was to overcome this state of things that the agreement was made, and according to Mr R. M. Ballantyne and others the agreement in question has had and is having more or less the desired effect. To benefit a man by relieving him of a duty, the performance of which endangers his position and risks his situation, is surely a good consideration.

The next point is that the agreement is in restraint of trade. I have gone carefully through all the authorities to which I have been referred, and I cannot bring myself to this conclusion. The agreement is not intended to prevent the defendant from pursuing his ordinary calling, nor has it that effect. If it had, then there are over two hundred cheese makers who ought to be out of employment, yet not one of these two hundred signatories come forward against the agreement except the defendant. If the restraint put upon the defendant were hurtful instead of beneficial, and yet were only partial in extent, it is not illegal. If to restrain a manufacturer from engaging in the manufacture of bamboo ware and fancy furniture anywhere in the Dominion of Canada is legal because he may still engage in the retail business of furniture and bamboo and fancy goods: *Cook* v. *Shaw*, 25 O. R.124: surely to restrain a man from engaging to make cheese under a contract whereby he is liable for the faults of another is equally legal, because he may still engage in the manufacture of cheese under a contract whereby he is not liable for the faults of another: see *Maxim-Nordenfeldt Co.* v. *Nordenfeldt*, [1893] 1 Ch. 670. But it must be remembered that all depends upon the qualification that

the covenant is one the tendency of which is not injurious to the public. Now, can any one say that to alter a practice in the manufacture of cheese which frequently puts inferior cheese upon the market, a practice which reaches in its effect even the markets of Europe, and which in the competition between countries hurts our national reputation as cheese makers, is not a practice which is injurious to the public? If it is, then the destruction of the practice is not only not an injury but a benefit to the public. I therefore must hold that the defendant fails in this objection.

All that now remains for me to decide is the more difficult and confused point as to whether the sum mentioned in the agreement to be paid by the defendant, namely, $200, is in the nature of a penalty or liquidated damages. This depends upon the primary rule of the construction to be put upon the document, in interpreting which other subordinate rules are laid down as to the mode of construction. It has long since been decided that the mere use of the words "liquidated damages," although not to be disregarded, is not conclusive. These words do not make a penalty any the less a penalty, and their substitution has little or no operation except perhaps in placing the onus upon the party who seeks to show that the amount is payable otherwise than as the document says.

Now while one branch of the law still seems shrouded in doubt and difficulty by the conflicting views of such eminent jurists as Jessel, M.R., in *Wallis* v. *Smith*, 21 Ch. D. 243, and James, L.J., in *Re Newman*, 4 Ch. D. 724, and Lord Coleridge, C.J., in *Magee* v. *Lavell*, L. R. 9 C. P. 107, yet, when the damages caused by the breach of a contract are incapable of being ascertained, the sum made by the contract payable upon such a breach is then to be regarded as liquidated damages. The question then arises, what is meant by the expression "incapable of being ascertained," and I find that "in their proper sense the words appear to refer to a case where no rule or measure of damages is available for the guidance of a jury as to the amount of the damages and a Judge would have to tell them they must fix the amount as best they can." Applying this test, I find it impossible to ascertain the damages; I would rather almost say nothing than

anything, and whether anything or nothing it matters not to the plaintiffs, for the amount is not for them when paid, but for the association which they represent, and this may be another reason, and a very strong reason too, why the amount is not a penalty but liquidated damages.

My judgment is, therefore, for the plaintiffs for the sum of $200 and costs. Execution stayed for thirty days.

NEW BRUNSWICK.

In the Supreme Court.

[FULL COURT, 31ST JANUARY, 1900.

Ex parte PRICE.

Affidavits in reply—Service—Time.

Affidavits to be read in reply were served on the day preceding the argument. Objection being taken to the sufficiency of the service:—

Held, that the words "those used by applicant in reply not less than one day" in the General Rule of Hilary Term, 1890, mean one *clear* day; and the service was insufficient.

Time for service extended and cause allowed to stand for a later day.

Barry, for the applicant.

Ransford, contra.

REGINA v. WILKINSON.

In re RESTIGOUCHE SALMON CLUB.

Motion to quash order—Rule nisi—Necessity for.

The proceedings in this case were brought before the

Court by writ of *certiorari* granted by consent. No rule to quash the order removed into Court was moved for. The cause was entered on the Crown paper by consent.

The Court refused to hear the argument until a rule to quash had been regularly moved for and taken out.

Murray, for the applicant.

Mott appeared to shew cause.

[9TH FEBRUARY, 1900.

Ex parte ALLAIN.

Affidavit—Marksman—Certificate of commissioner.

The affidavit on which a rule *nisi* for a *certiorari* was granted was made by a marksman. Objection was taken on showing cause that the certificate of the commissioner before whom the affidavit was sworn was not a compliance with Rule 1 of Hilary Term 11 V., in that the word "fully" was used instead of "perfectly" in the clause "who seemed perfectly to understand same."

Held, a sufficient compliance with the Rule.

Teed, for the applicant.

Phinney, Q.C., contra.

Ex parte JONES.

Costs—Supreme Court of Canada—Execution—Leave.

An appeal to the Supreme Court of Canada was allowed with costs to be paid to the appellant by a corporation.

Upon the *ex parte* application of the appellant this Court granted leave to issue execution for these costs, expressing a doubt as to the necessity for obtaining leave.

Curry, Q.C., for the motion.

STEWART v. CANADIAN PACIFIC R. W. CO.

Writ of summons—Misnomer—Amendment—Terms.

Appeal from an order of the Judge of the Carleton County Court.

The writ in the cause was in the Form "A" in schedule to 60 V. c. 28, except that the name "R. L." instead of that of the plaintiff was inserted in the clause, "and take notice that in default of your so doing the said R. L. may proceed thereon to judgment and execution." The defendant did not appear. After the issue of a writ of inquiry, the defendant moved to set aside the writ and all subsequent proceedings on account of this error. The Judge acceded to the motion, refusing leave to amend, applied for under the provisions of s. 66 of the Act, holding that the writ was a nullity.

Held, that the error was an irregularity, and leave to amend should have been granted.

Appeal allowed with costs, with directions to the Judge below to set aside all proceedings subsequent to the service of writ and to amend the writ; the defendant to have 20 days after amendment to appear and plead.

Thomas Lawson, for the appellant.

Connell, Q.C., for the respondent.

VIOLETTE v. MARTIN.

Security for costs—Plaintiff coming into jurisdiction pending action.

The plaintiff was a non-resident of the Province. The defendant applied for an order for a stay of proceedings until security for costs should be given. At the return of the summons, on shewing cause, an affidavit of the plaintiff was read in which she stated that she had, after service of the writ of summons, moved into the Province, and intended residing in the Province until after the termination of her suit.

Held, that the defendant was not entitled to security for costs.

Slipp, for the plaintiff.

Duffy, for the defendant.

Ex parte McCLEAVE.

Canada Temperance Act — Search warrant — Execution by informant — Void act—Validity of order for destruction of liquors.

One B. laid an information before the stipendiary magistrate for Moncton under the provisions of the Canada Temperance Act, and obtained a warrant to search the premises of the applicant, which he executed himself, and took the liquor seized before the magistrate. Subsequently, on the information of B., the applicant was convicted before the magistrate of unlawfully keeping the liquor for sale, and the liquor seized was condemned and its destruction ordered, which order was executed by B.

Held, on an application for a *certiorari* to remove the order for condemnation and destruction, that the informant could not lawfully execute his own warrant, and that the liquor was not lawfully before the magistrate, and the order for destruction was void.

TUCK, C.J., and McLEOD, C.J., dissented.

BARKER, J., took no part.

Teed, for the applicant.

Chandler, contra.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 8TH FEBRUARY, 1900.

MOIR v. PALMATIER.

Lease—Forfeiture by non-payment of rent—Agreement for sale by landlord to tenant—Power to landlord to re-sell on default—Exercise of option —Specific performance.

Appeal from decision of KILLAM, C.J., 19 Occ. N. 287, dismissed with costs.

MERCHANTS BANK v. McKENZIE.

Fraudulent conveyance—Attack by judgment creditor—Proof of consideration paid by alleged purchaser—Onus—Statute of Limitations—Concealed fraud.

Appeal from decision of KILLAM, J., 18 Occ. N. 367, dismissed with costs.

[9TH FEBRUARY, 1900.

DOIDGE v. MIMMS.

Executors and administrators—Claim for nursing deceased person—Manitoba Trustee Act, R. S. M. c. 146, s. 31—Notice given by a foreign administrator—Corroboration of agreement with deceased—Parties—Married woman plaintiff.

Appeal from the decision of a County Court. The original plaintiff was a married woman, who sued the administrator of the estate of a deceased person for the value of her services in nursing the deceased in his last illness and for meals supplied to other nurses. The action was tried without a jury, and resulted in a verdict for the defendant, on the ground that the action had not been brought within six months after the claim had been disputed by the administrator, under R. S. M. c. 146, s. 31. Objection having been taken at the trial to the capacity of the plaintiff to sue, her husband was allowed to be joined. The deceased had been in the employ of plaintiff's husband for some years, and for a year before his death had been his partner.

He had boarded and lodged at the house of the plaintiff's husband for nine years, and the plaintiff carried on the ordinary household work. The last illness of the deceased occupied about seven weeks, during all which time the plaintiff nursed and waited upon him, her husband assisting her.

The plaintiff testified to a conversation between herself and deceased at the commencement of the illnsss, in which the latter promised to recompense her for nursing him; there was no corroboration of her evidence on this point.

The intestate died in March, 1897. In June, 1897, letters of administration were granted to his sister, the defendant, by a Surrogate Court of the Province of Ontario. These letters were sealed by the Surrogate Court of the Eastern Judicial District of Manitoba in June, 1898. The claim was formally made to the administrator in August, 1897, and distinctly disputed by letters of the defendant's solicitor in January and February, 1898. The action was brought in June, 1899.

Held, that the action was not barred by the statute requiring an action against an executor or administrator to be brought within six months after notice disputing the claim. The deceased was domiciled in Manitoba at the time of his death. The cause of action arose in Manitoba, and the action was properly brought there. The administrator appointed in Ontario had no *locus standi* in Manitoba until the sealing of the letters there. Before that time she could not have been sued in Manitoba. It did not appear that the notice given before the sealing in the Manitoba Court should have force either from the time when it was given or from the date of the sealing.

It was a settled principle of the Court of Chancery in the administration of the estate of a deceased person, not to allow a claim upon the uncorroborated evidence of the claimant: *Dow* v. *Ellis,* 35 Beav. 579; *Re Finch,* 23 Ch. D. 267. In Ontario, 36 V. c. 10, s. 6, prevents a verdict in such a case. But in England there is no distinct law against it; the rule is one of prudence only: *Re Garnett,* 31 Ch. D. 1; *Re Hodgson, ib.* 177.

The plaintiff should be given the opportunity of proving her claim for nursing at another trial, if she desired it; costs to abide the event; otherwise the appeal should be dismissed: no costs of the appeal.

If a new trial had, the defence of coverture should be struck out, as well as the husband's name, so that the case would be restored to its original position of a claim by the wife upon a contract with herself personally.

Heap, for the plaintiff.

Hull, for the defendant.

In the County Court.

EASTERN JUDICIAL DISTRICT.

[WALKER, Co.J., 5TH FEBRUARY, 1900.

In re WINNIPEG DOMINION ELECTION.

Parliamentary elections—Recount of ballots—Ballots not marked in proper space—58 & 59 V. c. 13, s. 4 (D.)—Mandatory or directory.

Recount of ballots.

C. P. Wilson for Martin.

A. J. Andrews, for Puttee.

WALKER, Co.J.—The ballots objected to in this recount owing to the cross not being marked in the white circular space are 848 in number, of which 318 are for Mr. Martin and 530 for Mr. Puttee, and of these all but 180 were allowed by the deputy returning officers. In seven polls out of the sixty-six these ballots were rejected.

Mr. Andrews, for Mr. Puttee, contends that these ballots should be allowed, and relies principally on the judgment, and cases therein cited, of His Honour Judge McDougall in the *East York Case*, 32 C. L. J. 481. Mr. Andrews incidentally remarked in his argument that some of the deputy returning officers and scrutineers informed voters that ballots were equally good whether marked in the disc or division. This was not denied further than by a reference made to the printed instructions to voters posted in polling-booths; and it seems to be borne out by the fact that about three-fourths of the 848 ballots were allowed and counted, and without objection except in the case of one poll.

Mr. Wilson, for Mr. Martin, contends that the *East York Case* is not binding on me, and that s. 46 of the Dominion Election Act, as amended by 58 & 59 V. c. 13, s. 4, providing that the elector shall mark his ballot paper, "making a cross or crosses with a pencil on the white circular space or spaces

opposite to the name or names of the candidates for whom he intends to vote," is mandatory, and all ballots not marked as therein described on the white circular space are void ballōts; and in addition refers to recounts held after the same general election as that to which the *East York Case* related, (1) in Quebec by a Superior Court Judge, and (2) in Ontario by County Court Judges, in which ballots not marked in the white space were thrown out as void.

Neither of these has been reported, and Mr. Andrews says that in neither of them was the result of the election affected. I have no means of ascertaining the particulars of these cases—whether arguments were had and consideration given or not. Whereas in the *East York Case* the matter was fully argued by able counsel on each side—one of them being a member of Parliament who took part in the debate on the amendment to s. 46—consideration was reserved, and the result of the decision was the changing of the declaration of the returning officer and giving the seat to the opposing candidate. In that case 295 ballots were disputed on the same ground as are the 848 in this recount, and they were allowed for the reasons given in the judgment. The *East York Case* arose at the last general election for the Dominion, the judgment was reported in 1896, the member returned by that judgment took his seat and still holds it. Three sessions of Parliament have since passed and no amendment, declaratory or otherwise, has been made to this Act. I cannot be wrong, therefore, in assuming that Parliament, even if it was intended that s. 46 should be mandatory, was content with the holding of His Honour Judge McDougall "that s. 46, as it now stands, must be construed as being directory only, and that all ballots in which the elector has made his cross in the division containing the name of the candidate he votes for are good ballots."

I feel that I should be taking upon myself a great responsibility, did I not adhere to that judgment, as I should be disfranchising 848 voters—about one-sixth of the whole number of voters who voted—and thereby be the means of returning a representative against the declared wish of the

majority of the electors, and further of creating the anomaly of one member holding his seat by the allowance of certain ballots, and another member being elected to the same House through the rejection of similar ballots.

These ballots were all well marked, and clearly indicate for which candidate they were intended, and this seems to be the crucial point of all reported cases.

I consider, under all the facts as they appear to me, that I should not be justified in ignoring the plain intention of the electorate as expressed by their ballots.

I therefore allow these ballots.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DRAINAGE REFEREE.] [24TH JANUARY, 1899.

McCULLOCH v. TOWNSHIP OF CALEDONIA.

Costs—Scale of—Drainage Act—Reference.

Section 113 of the Drainage Act, R. S. O. c. 226, providing that the tariff of the County Court shall be the tariff of costs under that Act, applies only to actions which ought properly to have been instituted by notice under s. 93, and not to actions referred under s. 94 which might properly have been brought at common law without reference to the Drainage Act, and which are referred to the Referee because the Court thinks they may be more conveniently disposed of by him.

J. H. Moss, for the plaintiff.

J. B. O'Brian, for the defendants.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 8TH FEBRUARY, 1900.

GROVE v. BENDER.

Costs—Appeal for—Error in principle—Scale of costs—Action for price of goods sold—Refusal to accept—Re-sale pendente lite—Recovery of difference in price—Amount in controversy.

The plaintiffs brought an action in a County Court for $175.55, the price of goods sold. The defendants had rejected the goods on the ground that they were not up to sample. After delivery of the statement of claim the plaintiffs

sold the goods, and delivered an amended statement of claim, in which they gave the defendants credit for the proceeds of the sale, and proceeded with their action for the balance $77.90. The trial Judge found that the goods were equal to sample, and gave the plaintiffs judgment for $77.90.

As to costs he held that by their amended statement of claim the plaintiffs' cause of action became an entirely new one, and solely one within the jurisdiction of a Division Court, and for this reason they were entitled only to Division Court costs, and the defendants were entitled to set off the excess of their costs incurred in the County Court.

Held, that an appeal lay to a Divisional Court, notwithstanding that costs only were involved, because the judgment appealed from showed that the trial Judge had proceeded upon a wrong principle.

Held, also, that the plaintiffs, having properly brought their action in the County Court, should not be deprived of their costs of such action by what they had done *pendente lite*, and were entitled to costs on the County Court scale.

Worrell, Q.C., for the plaintiffs.

Vickers, for the defendants.

[1st March, 1900.

UNION BANK OF CANADA v. RIDEAU LUMBER CO.

Appeal—Abandonment—Reinstatement—Grounds for—Leave to appeal—Judgment—Error—Injustice.

The defendants, after setting down an appeal for hearing by a Divisional Court, served notice abandoning it, and the case was struck out of the list. They afterwards moved to have it restored to the list.

Held, that if the motion could be treated as one for leave to appeal notwithstanding the lapse of time, it would be incumbent upon the applicants to shew that *prima facie* the judgment below was wrong; and there being no error apparent on the face of the judgment, and no specific error having been pointed out, such an application must be refused.

But, *semble*, the motion could not be so treated.

The judgment below found that the defendants were trespassers and directed a reference as to damages. When the appeal was abandoned the defendants thought the claim of the plaintiffs would be much smaller than it subsequently appeared to be; and on learning the size of the claim, the defendants wished to renew their appeal.

Held, no ground for interfering.

The defendants had not made out any case showing that any injustice was likely to arise if they were not allowed to appeal, or that they were only asking for what was just.

Aylesworth, Q.C., for the defendants.

W. M. Douglas, Q.C., for the plaintiffs.

In re WOOLIVER AND COUNTY OF KENT.

Public schools—County council—Appointment of arbitrators—Appeal from township council—Discretion—Mandamus.

The provisions of s.-s. 3 of s. 39 of the Public Schools Act, R. S. O. c. 292, are permissive, not imperative.

It is plain from a review of the history of the legislation as to the matter with which that section deals, that the Legislature in 1887 deliberately abandoned the policy of making it obligatory upon the county council to appoint arbitrators, and plainly vested in the county council the discretion of appointing them or not, as it might in the exercise of that discretion deem proper.

Order of ARMOUR, C.J., granting a mandamus to the county council to appoint arbitrators to hear an appeal against a by-law of a township council providing for the alteration of the boundaries of school sections, reversed.

Aylesworth, Q.C., for the county corporation.

John S. Fraser, for the applicants.

[5TH MARCH, 1900

WINDSOR FAIR GROUNDS AND DRIVING PARK ASS'N v. HIGHLAND PARK CLUB.

Parties—Third party notice—Agreement—Rule 209—Appearance

The plaintiffs' claim against the defendants was for the balance of a sum agreed to be paid for the time of a race-track. The defendants alleged that a ferry company had agreed to pay and contribute towards the hire of the track a certain sum for each day of the race meetings, in consideration of the increased travel, and that the defendants had thereby been induced to enter into the agreement with the plaintiffs.

Held, that this allegation was not sufficient to support a claim against the ferry company for contribution, indemnity, or any other relief over, within Rule 209; and therefore the defendants should not have been allowed to serve a third party notice.

Held, also, that the proper practice in moving against a third party notice, is to move without entering an appearance.

Aylesworth, Q.C., for the ferry company.

F. A. Anglin, for the defendants.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 8TH MARCH, 1900.

BROCKBANK v. HOLMES.

Mortgage—Authority of solicitor for mortgagors to receive mortgage money—Execution—Alteration—Evidence—Presumption.

One of the defendants, a widow, agreed to purchase land, and employed a solicitor to act for her in the matter of the purchase. The property was subject to a mortgage for $3,500, which the mortgagee required should be paid, and the solicitor arranged with P. to advance $2,500 of the amount, with the plaintiff to advance $500 upon the interest of the defendants in other lands, and he himself promised to advance the remainder of the sum required, the widow having also a little money of her own. A mortgage from the

widow to P. for $2,500 was accordingly executed; also a mortgage from the defendants to the plaintiff for $500; and a mortgage from the widow to the solicitor for $300. All these mortgages and a conveyance from the vendor to the widow were registered by the solicitor, who had previously received from the plaintiff $400 of the amount the plaintiff had agreed to advance, giving a receipt for the amount "for investment Jemima and Christina Holmes mortgage," and making the affidavit of execution of the mortgage. Shortly afterwards the plaintiff gave the solicitor $90 further of the amount he was advancing, and the solicitor gave him credit for $10 which he owed to the plaintiff. From the time of the completion of the documents the defendants never made any further inquiry as to the matter, and only went to the solicitor to pay him his account for his services, and to ask him for the mortgage deed for the $3,500, which they assumed he had paid, and supposed he would have, but which he told them was held by P. as one of the title deeds. As a matter of fact the solicitor appropriated the $490 to his own use and never paid it to the original mortgagee.

In an action upon the $500 mortgage the defendants denied the making of it, and denied that any money was ever advanced by the plaintiff to them upon it.

Held, affirming the findings of MEREDITH, C.J., the trial Judge, that the solicitor had the authority of the defendants to receive from the plaintiff the mortgage money on their behalf for the purpose of applying it in part payment of the $3,500 mortgage.

Held, also, ARMOUR, C.J., *dubitante*, that the proper conclusion from the evidence was that the plaintiff's name was written in the mortgage at the time of its execution. The instrument on its face bore every indication that the name of the plaintiff was written at the same time as the names of the defendants and the other written portions of it. The positive evidence of the witness who drew it supported the appearance of the document itself, and there was also a presumption, rebuttable of course, in favour of its regularity. The recollection of the solicitor, who was the subscribing

witness, was the other way, but he was not positive upon the point. The surrounding circumstances were as consistent with one conclusion as the other, and the benefit of any doubt should be given in favour of the validity rather than of the invalidity of an instrument such as this, regular upon its face, intended by the defendants to be acted upon, acted upon as they intended, and strongly supported.

Holman, Q.C., for the defendants.

S. C. Smoke, for the plaintiff.

[BOYD, C., 28TH OCTOBER, 1899.

ALLSTADT v. GORTNER.

Statute of Limitations—Moneys in Court—Payment out by mistake—Lapse of time—Restitution—Mistake of officer of Court—Interest.

The Statute of Limitations has relation only between subject and subject—the Crown cannot be bound by it.

The Court is a public trustee as to all moneys and securities in its hands.

Moneys in Court are in *custodia legis*—in this case tantamount to *custodia regis*, and to such a fund and such a custodian the Statute of Limitations has no pertinence.

Suitors and claimants are not barred by any lapse of time in their application for payment out of Court of moneys to which they are entitled, and reciprocally they should not be protected by lapse of time from making restitution if they have improperly or fraudulently received moneys from the Court to which they had no just claim; and an order was made ordering restitution after a period of fourteen years, although without interest, as the mistake was that of an officer of the Court.

J. Hoskin, Q.C., for the Accountant of the Court.

E. Sydney Smith, Q.C., for the defendants Francis and William Gortner.

[21ST DECEMBER, 1899.

PEDLOW v. TOWN OF RENFREW.

Highway—Dedication and acceptance—Registered plan—Statutory regulations—Sale of land by reference to it—Setting apart street.

A public highway may be established by dedication and acceptance.

The non-conformity to statutory regulations of a registered plan which shews a new street, may affect the right to have it treated as properly registered so as to give a new basis for description of lands sold by reference to it, but it will not affect transactions which manifest the actual setting apart and acceptance of the street on the site proposed, by the co-operation of the owners and the municipal authorities.

Aylesworth, Q.C., and *T. W. McGarry*, for the plaintiff.

S. H. Blake, Q.C., and *James Craig*, Q.C., for the defendants.

[ARMOUR, C.J., 16TH JANUARY, 1900.

SILLS v. COUNTY OF LENNOX AND ADDINGTON.

Municipal corporations—Administration of justice accounts—Liability for payment for special services—Detection of crime—Certified account—R. S. O. c. 101. s. 12.

The gist of s. 12 of R. S. O. c. 101 is to empower a warden and county attorney to authorize any constable or other person to perform special services not covered by the ordinary tariff, which are, in their opinion, necessary for the detection of crime, or the capture of persons believed to have committed serious crimes, and to do so upon the credit of the county corporation, and so to render them liable for the payment for such special services; and the liability may attach whether the account is certified by the warden and county attorney, as required by the said section, or not.

Aylesworth, Q.C., and *Deroche*, Q.C., for the plaintiff.

W. G. Wilson, for the defendant.

[MEREDITH, C.J., 16TH JANUARY, 1900.

BARBER v. McCUAIG.

Res judicata—Premature action—Second action for same cause—Mortgagor and mortgagee—Purchaser's covenant—Assignment of—Agreement as to —Exhaustion of remedies.

A mortgagee had taken an assignment from a mortgagor of the covenant of a purchaser of the equity to pay off the mortgage, and had, on receiving certain securities, agreed with the purchaser not to sue him until certain other remedies were exhausted, and had been unsuccessful in a suit against the mortgagor, on the ground that the remedies were not exhausted: *Barber* v. *McCuaig*, 24 A. R. 492, 17 Occ. N. 280; 29 S. C. R. 126, 19 Occ. N. 52.

In a second action on the same covenant:—

Held, that the Court may properly examine the pleadings, evidence, and proceedings at the trial of the former action, and that the reports of the reasons given for the judgments may be looked at for the purpose of ascertaining what the law is.

That the dismissal of an action on the ground that it was prematurely brought, is no bar to another action on the same demand after time has removed the objection. And that the mortgagee, having exhausted her remedies and made an arrangement with the purchaser by which she was placed in the same position with respect to him as she was before she received the securities, was entitled to recover notwithstanding that she had retransferred the securities to him and agreed not to sue on his covenant; but the latter agreement was not to apply to the mortgagor, in case the purchaser's covenant was reassigned to him.

Robinson, Q.C., and *W. H. Irving*, for the plaintiff.

Aylesworth, Q.C., for the defendant.

IN CHAMBERS.

[ARMOUR, C.J., 26TH FEBRUARY, 1900.

MOKE v. TOWNSHIP OF OSNABRUCK.

Costs—Scale of—Drainage Act—Reference.

Where an action is brought to recover damages for injury to property by the construction of drainage works, and the claim is within the scope of s. 93 of the Drainage Act, R. S. O. c. 226, under which proceedings before the Drainage Referee may be taken without bringing an action, and an order is made referring the action to the Referee for trial, the costs should be taxed according to the tariff of the County Courts, under s. 113.

J. H. Moss, for the plaintiff.

Cattanach, for the defendants.

[FERGUSON, J., 16TH FEBRUARY, 1900.

COLE v. CANADIAN PACIFIC R. W. CO.

Evidence—Discovery—Negligence—Absence of safeguards—Subsequent placing.

Where an injury is alleged to have been caused by the negligence of the defendant in not furnishing proper safeguards at some place of danger, evidence of safeguards placed there by him after the injury is not admissible for the purpose of shewing his prior negligence; and upon an examination for discovery the defendant is justified in declining under advice to answer questions relating to such subsequent placing.

D. L. McCarthy, for the plaintiff.

Shirley Denison, for the defendants.

[STREET, J., 3RD MARCH, 1900.

ALLISON v. BREEN.

Limitation of actions—Judgment—Revivor—Time—Notice.

In 1894 the plaintiff obtained *ex parte* (the defendant being out of the jurisdiction) an order reviving a judgment

for the payment of money which he had recovered against the defendant in 1875, and allowing the entry of a suggestion on the judgment roll, and the issue of execution. The plaintiff entered the suggestion in 1894, and afterwards examined the defendant as a judgment debtor, whereupon the defendant made an offer of settlement, which was not accepted. The plaintiff died in 1895 and the defendant in 1899, after which the personal representative of the plaintiff obtained an order on præcipe reviving the action in his name as plaintiff and in that of the personal representative of the defendant as defendant.

Held, that the last order should have been made on notice, but it was proper to treat an application to set it aside as a substantive motion on notice, and, so treating it, the order should be confirmed.

The order made in 1894 reviving the judgment should have been made on notice, under the Common Law Procedure Act, then in force, but, under the circumstances of the defendant's absence from the country, his subsequent examination, and the attempted settlement, it was a valid and binding order.

Held, also, following *Mason* v. *Johnston,* 20 A. R. 412, that the judgment remained in force for twenty years, and the entry of the suggestion within that time was effectual to renew the time from which the statute begins to run.

Tytler and *C. J. McCabe,* for the defendant by revivor.

J. J. Maclennan, for the plaintiff by revivor.

[5TH MARCH, 1900.

REGINA *ex rel.* BURNHAM v. HAGERMAN AND BEAMISH.

Municipal elections—Quo warranto application—Several respondents—One application—Aldermen of town—Property qualification—Title by possession—Incumbrance—Apportionment of—Estate partly freehold and partly leasehold.

A motion in the nature of a *quo warranto* proceeding, under the Municipal Act, to determine the validity of the

election of the two respondents as aldermen for the town of Port Hope.

Section 225 of the Act provides that "in case the grounds of objection apply equally to two or more persons elected, the relator may proceed by one motion against such persons."

In this case the property qualification of both respondents was attacked, but upon separate and distinct grounds, the properties upon which they severally attempted to qualify being separate and distinct.

Held, that it was not competent for the relator to include both in one motion, by virtue of s. 225 or otherwise. The old *quo warranto* practice proceeded upon the ground that an offence was charged; and it would have been manifestly improper to charge two persons in one indictment, each with an offence with which the other had nothing to do: *Symmers* v. *Regan*, Cowp. 500; *Rex* v. *Warlow*, 2 M. & S. 75.

Held, also, that the respondents were properly qualified within s. 76 of the Act.

Beamish was assessed for $2,000 upon the last revised assessment roll as owner of land of which he had been in possession since 1886. His title was admitted by the former owner, who executed a conveyance shortly after the election.

Hagerman's wife was assessed at $800 as owner of land and at $600 as tenant of other land. There was a mortgage on the freehold at the time of election of $665 and upon some chattels assessed at $500. Following the principle of *Regina ex rel. Ferris* v. *Speck*, 28 O. R. 486, 17 Occ. N. 198, the amount unpaid on the mortgage should be apportioned between the land and the chattels in proportion to their assessed value, which would make $408 of the $665 a charge to be deducted from the assessed value of the land, and leave $392 as the net value . The wife's leasehold was free from incumbrances. By s. 76 the estate may be "partly freehold and partly leasehold," and the amount of qualification in a town is "freehold to $600 or leasehold to $1,200." In the

absence of any judicial interpretation hitherto, these words should be held to mean that a person having one-half the amount of the freehold qualification and also one-half the amount of the leasehold qualification, is duly qualified.

Motion dismissed with costs.

Masten, for the relator.

H. J. Scott, Q.C., for the respondent Hagerman.

H. A. Ward, for the respondent Beamish.

[MEREDITH, J., 6TH MARCH, 1900.

ROMBOUGH v. BALCH.

Appeal—Supreme Court of Canada—Security for costs—Stay of proceedings—Payment of money out of Court.

At the trial the plaintiffs recovered judgment in the High Court against the defendants for damages and costs. The defendants appealed to the Court of Appeal, paying $200 into Court as security to the plaintiffs for the costs of such appeal. The appeal was dismissed with costs. The defendants launched a further appeal to the Supreme Court of Canada, and gave the security required by s. 46 of the Supreme and Exchequer Courts Act, but no other security.

Held, that proceedings to enforce the plaintiffs' judgment in the High Court were not stayed, either by force of s. 48 or otherwise.

But the Court was not bound to pay out immediately to the plaintiffs the sum of $200 paid in by the defendants, the judgment of the Court of Appeal being stayed pending the appeal to the Supreme Court, which might determine that the plaintiffs were not entitled to the costs of the Court of Appeal.

And in this case the money ought not to be paid to the plaintiffs, from whom it could never be recovered, and whose solicitors declined to take it upon the usual undertaking, but should remain in Court during the pending appeal.

J. H. Moss, for the plaintiffs.

W. H. Blake, for the defendants.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY,

[BARKER, J., 12TH JANUARY, 1900.

CUSHING v. McLEOD.

Ship—Charterparty—Customary despatch—Notice—Lay days—Demurrage.

By charterparty the defendant's ship was to proceed to the port of St. John for lumber for Buenos Ayres, to haul once to loading berth as might be required by the charterer, with the privilege to the charterer of moving the vessel afterwards at his own expense. It was provided that the cargo was to be furnished at the customary despatch; that lay days should commence from the time the vessel was ready to receive the cargo and written notice thereof given to the charterer, and that for each day's detention by the charterer's default he should forfeit $60. On arrival of the vessel the master was notified by the charterer to proceed to the Government railway wharf to load. On the 28th August the master mailed a notice to the charterer that the vessel was then at loading berth and ready to receive cargo on the 29th. At the time notice was sent, the vessel was not at loading berth.

Held, that the vessel should have been at loading berth ready to receive cargo at the time notice was sent, and that the notice was insufficient.

The words "customary despatch" in the above charter have not a recognized meaning at the port of St. John with reference to the loading of dry lumber for shipment to South American ports. They mean that the vessel shall be loaded at the usual rate or despatch of persons having a cargo ready for loading.

Upon the evidence the Court found the rate to be 35M. per weather working day; substantial work, though not amounting to half a day to count as half a day.

Pugsley, Q.C., and *Bamhill,* for the plaintiff.

Stockton, Q.C., and *C. J. Coster,* for the defendant.

NORTH-WEST TERRITORIES

In the Supreme Court.

[SCOTT J., 23RD FEBRUARY, 1900.

CONRAD v. ALBERTA MINING CO.

Writ of summons—Substituted service—Order for—Material on application—Motion to set aside order—Fraud—Foreigner—Copy of writ—Judgment—Sale of lands under—Title of purchaser—Leave to defend—Terms.

The plaintiffs had, as members of the firm of I. G. Baker & Co., obtained a judgment in 1886 against the defendants the Alberta Mining Company for a certain sum of money, and were, under the terms of the dissolution of partnership, entitled to the benefit of the same. After several unsuccessful attempts to obtain satisfaction by execution, the plaintiffs in 1896 commenced another action against the defendants the Alberta Mining Company, and joined six other individual defendants who were shareholders in the company, alleging that the six individual defendants held certain mining locations, for which patents had been issued to them, as trustees for the defendant company, and claimed: (1) a declaration that the individual defendants were such trustees; (2) judgment for the sale of the lands in question; (3) payment of their claim and costs out of the proceeds.

After several unsuccessful attempts to serve John J. Healy, one of the defendants, with the writ of summons at Seattle, Washington, and at Sitka, Alaska, the plaintiffs, upon the affidavit of one of their advocates stating that the writ of summons had been sent to one Lytton Taylor, at Sitka, Alaska, for service upon Healy, and that a letter which was produced as an exhibit had been received from Taylor from Nashville, Tennessee, stating that the letter containing the writ had been forwarded to him there; that Healy's headquarters were in the Yukon Territory; that the plaintiffs might write to one R. C. Rogers, United States Commissioner at Sitka, Alaska, who was acquainted with Healy and would no doubt be able to find him; that there was a United States Deputy Collector of Customs at Circle City, Alaska; and that Healy was in the employ of the North-West Trading Company, whose headquarters were at Chicago, Illinois; obtained

an order to serve Healy substitutionally by mailing the writ, together with copies of the statement of claim and the order, in prepaid registered letters addressed to Healy: first, in care of R. C. Rogers, United States Commissioner, Sitka, Alaska; second, in care of the United States Deputy Collector of Customs, Circle City, Alaska; and, third, in care of the North-West Trading Company, Chicago, Illinois.

None of the defendants entered any defence to the action, and, on proving compliance with the terms of the order for substitutional service, judgment was entered against Healy and all the other defendants, declaring them trustees of the mining lands in question, and directing a sale of the same and payment of the plaintiffs' claim and costs out of the proceeds.

Under this judgment the lands were sold, and one John Ham Sills became the purchaser for the sum of $2,200. On the 6th December, 1897, the sale was confirmed by an order of the Court, and the lands, together with all ore, minerals, and mining rights therein, were vested in Sills by a vesting order, which directed the cancellation of the certificates of title previously issued to the defendants, and the issue of new certificates to Sills. This order was obeyed by the registrar, and new certificates issued as directed. Out of the purchase money $1,580.70 was applied in payment of the plaintiffs' claim and costs, and $619.30 still remained in Court to the credit of the action.

In June, 1899, the defendant Healy made an application, by summons in Chambers, to have the writ of summons, the copy and service thereof, the various orders for substitutional service, the judgment entered in the action, and the order confirming the sale of the lands, and all other proceedings, set aside, upon the grounds: (1) that the materials upon which the order for substitutional service was granted, were insufficient; (2) that the proceedings had never actually come to the defendant Healy's notice before the judgment and sale of the lands; (3) that the judgment was obtained by the fraud of the plaintiffs and by imposing on the Court; (4) that the service of the writ upon him was a nullity and void, inasmuch as he was not a British subject, and that notice of the writ only should have been served, instead of a copy thereof.

In his affidavit filed in support of the application the defendant Healy swore that at the time of the issue of the writ he was, to the knowledge of the plaintiffs and of the secretary of the company, one J. S. Dennis, residing in Chicago, in the employ of the North American Transportation Company; that he had never received the registered letters containing the writ, and knew nothing about the proceedings until March, 1899; that he was not a trustee for the company of the lands in question; that one of the plaintiffs, W. G. Conrad, had fraudulently attempted to act as his agent to sell the lands in England under a forged power of attorney; that both the plaintiffs knew he was not a trustee; and that he believed they had taken the proceedings with the fraudulent design of deceiving the Court and obtaining the judgment and sale of the lands without his knowledge.

The plaintiff W. G. Conrad, by an affidavit, denied categorically all the acts and knowledge with which he was charged in Healy's affidavit.

Held, that the order for substitutional service had been granted upon sufficient material; (2) that the alleged fraud had not been proven; (3) following *Moore* v. *Martin*, 1 N. W. T. Reps., part 2, p. 48, that service of the writ itself upon Healy, though on a foreigner out of the jurisdiction, was neither a nullity nor irregular, inasmuch as the form of writ provided in the Territories is itself a notice; (4) that, although Healy had had no actual notice of the proceedings, yet, as the substitutional service was effected in the mode prescribed in the order, and the order made upon sufficient material, the Court had jurisdiction to deal with his interest in the property, and that the title of the purchaser Sills should not be interfered with, nor was Sills bound to ascertain that the substitutional service provided for had had the effect of bringing the proceedings to Healy's notice; but (5), that, as the defendant Healy had disclosed a defence upon the merits, he should be allowed in to defend upon giving security for the plaintiffs' costs within six weeks of the date of the judgment, to the satisfaction of the clerk.

R. B. Bennett, for the defendant Healy.

P. McCarthy, Q.C., for the plaintiffs.

Supreme Court of Canada.

NOVA SCOTIA.] [29TH NOVEMBER, 1899.

ARCHIBALD v. HANDLEY.

Partition of land—Tenants in common—Statute of Limitations—Possession.

Under the Nova Scotia Statute of Limitations, R. S. N. S., 5th ser., c. 112, a possession of land, in order to ripen into a title and oust the real owner, must be uninterrupted during the whole statutory period. If abandoned at any time during such period, the law will attribute it to the person having title.

Possession by a series of persons during the period will bar the title, though some of such persons were not in privity with their predecessors.

Where one of two tenants in common had possession of the land as against his co-tenant, the bringing of an action of ejectment in their joint names and entry of judgment therein gave a fresh right of entry to both, and interrupted the prescription accruing in favour of the tenant in possession.

Judgment of the Supreme Court of Nova Scotia, 32 N. S. Reps. 1, affirmed.

Harrington, Q.C., for the appellant.

Newcombe, Q.C., and *Kenny*, for the respondent.

[20TH FEBRUARY, 1900.

FRASER v. DREW.

New trial—Verdict—Finding of jury—Question of fact—Misapprehension.

Where a case has been properly submitted to the jury, and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted

on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial Judge was dissatisfied with the verdict.

Drysdale, Q.C., for the appellant.

Harris, Q.C., for the respondent.

NEW BRUNSWICK.] [29TH NOVEMBER, 1899.

JONES v CITY OF ST. JOHN.

Assessment and taxes—Domicil—Change of—Intention—59 V. c. 61 (N.B.).

By the St. John City Assessment Act, 59 V. c. 61, s. 2, "for the purposes of assessment any person having his home or domicil, or carrying on business, or having any office or place of business, or any occupation, employment, or profession, within the city of St. John, shall be deemed . . . an inhabitant and resident of the said city."

J. carried on business in St. John as a brewer, up to 1893, when he sold the brewery to three of his sons, and conveyed his house and furniture to his adult children, in trust for them all. He then went to New York, where he carried on the business of buying and selling stocks and other securities, having offices for such business and living at a hotel, paying for a room in the latter only when occupied. During the next four years he spent about four months in each at St. John, visiting his children and taking recreation. He had no business interests there, but attended meetings of the directors of the Bank of New Brunswick during his yearly visits. He was never personally taxed in New York, and took no part in municipal matters there. Being assessed in 1897 on personal property in St. John, he appealed against the assessment unsuccessfully, and then applied for a writ of *certiorari* wih a view to having it quashed.

Held, reversing the judgment of the Supreme Court of New Brunswick, that, as there had been a long continued actual residence by J. in New York, and as on his appeal against the assessment he had avowed his *bona fide* intention of making it his home permanently, or at least for an indefinite time, and his determination not to return to St.

John to reside, he had acquired a new home or domicil, and that in St. John had been abandoned, within the meaning of the Act.

Currey, Q.C., for the appellant.

C. J. Coster, for the respondents.

HESSE v. ST. JOHN R. W. CO.

Street railways—Negligence—Damages—Improper evidence—Misdirection—60 V. c. 24, s. 370 (N. B.)—New trial—Foreign commission.

By 60 V. c. 24, s. 370 (N. B.), "a new trial is not to be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless, in the opinion of the Court, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action." On the trial of an action against an electric street railway company to recover damages for personal injuries, the vice-president of the company, called on the plaintiff's behalf, was asked on direct examination the amount of bonds issued by the company, the counsel on opening to the jury having stated that the company were making large sums of money out of the road. On cross-examination the witness was questioned as to the disposition of the proceeds of debentures, and on re-examination the plaintiff's counsel interrogated him at length as to the selling price of the shares on the Montreal exchange, and proved that they sold at about 50 per cent. premium. The Judge in charging the jury directed them to assess the damages "upon the extent of the injury plaintiff received, independent of what these people may be, or whether they are rich or poor." The plaintiff obtained a verdict with heavy damages.

Held, that on the cross-examination of the witness by defendants' counsel the door was not opened for re-examination as to the selling price of the stock; that in view of the amount of the verdict it was quite likely that the general observation of the Judge in his charge did not remove its effect on the jury as to the financial ability of the company to respond well in damages.

The injury of which the plaintiff complained was the crushing of his foot, and on the day of the accident the medical staff of the hospital where he had been taken held a consultation and were divided as to the necessity for amputation. Dr. W., who thought the limb might be saved, was, four days later, appointed by the company, at the suggestion of the plaintiff's attorney, to co-operate with the plaintiff's physician. Eventually the foot was amputated, and the plaintiff made a good recovery. On the trial the plaintiff's physician swore to a conversation with Dr. W., four days after the first consultation and three days before the amputation, when Dr. W. stated that if he could induce the plaintiff's attorney to view it from a surgeon's standpoint and not use it to work on the sympathies of the jury, he might consider more fully the question of amputation. The Judge in his charge referred to this conversation, and told the jury that it seemed to him very important if Dr. W. was using his position as one of the hospital staff to keep the limb on when it should have been taken off, and that he thought it very reprehensible.

Held, STRONG, C.J., and GWYNNE, J., dissenting, that, as Dr. W. did not represent the company at the first consultation, when he opposed amputation; as others of the staff took the same view; and there was no proof that amputation was delayed through his instrumentality; and as the jury would certainly consider the Judge's remarks as bearing on the contention made on the plaintiff's behalf that amputation should have taken place on the very day of the accident, it must have affected the amount of the verdict.

To tell a jury to ask themselves, "If I were plaintiff, how much ought I to be paid if the company did me an injury?" is not a proper direction.

A party to an action who procures a commission for taking evidence abroad has no right to prevent its return.

Appeal allowed without costs, and new trial ordered, limited to amount of damages.

Quigley, Q.C., and *Stockton*, Q.C., for the appellant.

Pugsley, Q.C., and *McLean*, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 7TH FEBRUARY, 1900.

IRVINE v. SPARKS.

County Court appeal—Action tried with a jury—Motion for new trial—Judgment.

There is no appeal to a Divisional Court from a judgment of a County Court on a motion for a new trial made to that Court, in an action tried with a jury.

Brown v. *Carpenter*, 27 O. R. 412, followed.

Aylesworth, Q.C., for the appellant, the defendant.

Shepley, Q.C., for the plaintiff.

[2ND MARCH, 1900.

RICKETTS v. VILLAGE OF MARKDALE.

Municipal corporations—Highway—Injury to playing children—Repair—Lord Campbell's Act—Loss of child—Damages—Reasonable expectation of pecuniary benefit.

Children are entitled to play upon highways where there is no prohibitory local law, and where their presence is not prejudicial to the ordinary user for traffic and passage, and municipal corporations are bound to keep them in repair, and are responsible for damages sustained by any person by reason of default in so doing.

Constitution and characteristics of highways and streets in England and Canada compared.

In an action under Lord Campbell's Act by a parent for the death of his child by the negligence of the defendant, it is not necessary to show that any pecuniary benefit has

been actually received; but such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages, is sufficient.

Judgment of FALCONBRIDGE, J., 31 O. R. 180, 19 Occ. N. 390, reversed.

W. H. Blake, for the plaintiffs.

J. B. Lucas and *W. H. Wright*, for the defendants.

W. J. Hatton, for the third party.

[BOYD, C., ROBERTSON, J., 10TH FEBRUARY, 1900.

IANSON v. CLYDE.

Executors and administrators—Judgment against executors—Evidence of testator's debt—Indorsement of note by executors—Devolution of Estates Act—Caution—"In the hands" of executors—Estate—Devise.

A judgment against executors is only *prima facie* evidence of its being for a debt due by the testator, and the parties interested in the real estate are at liberty to disprove it.

In an action by a judgment creditor on a judgment recovered on a promissory note discounted by him, which note was received by the executors for the sale of personal property of the testator, and indorsed "without recourse" to the plaintiff:—

Held, that the indorsement of the note by the executors would not make it a debt of the testator in the hands of the indorsee.

Held, also, that the effect of the Devolution of Estates Act and amendments, acted upon by the registration of a caution under the sanction of a County Court Judge, after the twelve months had expired, was to place lands of a testator again under the power of his executors so that they could sell them to satisfy debts; and that the expression "in the hands" of executors, as applied to property of the testator, is satisfied if it is under their control or saleable at their instance; and that the operation of a devise of lands is only postponed for the purposes of administration, and

the estate does not pass through the medium of the executors, but by the operation of the devise.

Aylesworth, Q.C., and *Bradford*, for the plaintiff.

Clute, Q.C., and *Yarnold*, for the defendants other than the executors.

Ormiston, for the defendant John Clyde, an executor.

A. G. Slaght, for the defendant Thomas Allen, the other executor.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 15TH FEBRUARY, 1900.

CANADIAN MUTUAL L. & I. CO. v. NISBET.

Receivership order — Life policy—Assignment of—Security for money—R. S. O. c. 77, s. 18.

Held, that the plaintiffs were entitled to a receivership order to receive the defendant's interest in a life ten-payments policy, which was fully paid up,—the same having been assigned to the plaintiffs as security for a debt due to them, and the assignment entitling the defendant to receive from time to time the cash surrender value of the bonus additions to the policy, and so having ceased to be exigible in execution under R. S. O. c. 77, s. 18, as a security for money, —on the principle that the benefit of the defendant's interest in the policy under ordinary process being defeated by a prior title,—that of his assignee,—not extending to the whole interest of the defendant in the property upon which the judgment was proposed to be executed,—the plaintiffs were entitled to the aid of the Court to enable them to reach it.

A. McLean Macdonell, for the plaintiffs.

J. H. Moss, for the defendant.

[19TH FEBRUARY, 1900.

LEES v. OTTAWA AND NEW YORK R. W. CO.

Railways—Tolls not fixed by Governor-General — Three-fold penalty—Right to receive back—51 V. c. 29, s. 227.

The fact that a railway company have not had their tolls approved by the Governor-General under 51 V. c. 29, s. 227,

does not in itself entitle a passenger who has paid such tolls to recover three times the amount under s. 290 of that Act, in the absence of evidence that the fares charged were unreasonable or excessive; nor is such passenger entitled to recover back the amount so paid by him as paid under a mistake of fact, where it is such as in equity and conscience he ought to have paid.

W. A. D. Lees, the plaintiff, in person.

Curle, for the defendants.

[ARMOUR, C.J., STREET, J., 18TH MARCH, 1900.

PICKARD v. TIMS.

Costs—Scale of—County Court—Defence arising after action — Discharge of part of claim—Division Court garnishment—Payment into Court.

On the 5th August, 1899, a creditor of the plaintiff issued a summons out of a Division Court claiming $64 from the plaintiff, and claiming to attach moneys in the hands of the defendant, as garnishee, to answer the plaintiff's debt, and served it on both primary debtor and garnishee on the day of its issue. On the 17th August this action was brought in a County Court to recover $133.40. On the 28th August the garnishee (the defendant in this action) paid $57.50 into the Division Court. On the 6th September judgment was given in the Division Court for the primary creditor against the primary debtor (the plaintiff in this action) for $64 and against the garnishee for $57.50. On the 5th October the plaintiff delivered his statement of claim for the whole $133.40.

Held, that the service of the summons was no bar to this action; that the defence that the defendant was discharged as to $57.50 by his payment into the Division Court was a defence which did not arise until the payment was made and judgment given in the Division Court, and was consequently a defence arising after action brought; and such payment and judgment could not have relation back to the time of service of the summons; and therefore, it having been adjudged in this action that the plaintiff was entitled to the

amount claimed by him, less the $57.50, the action was properly brought in a County Court, and the plaintiff was entitled to costs on the scale of that Court.

Jackson, Q.C., for the plaintiff.

Shepley, Q.C., for the defendant.

[ARMOUR, C.J., 19TH JANUARY, 1900.

PARNELL v. DEAN.

Trade agreement — Covenant not to carry on business—Breach—Constitution of action—Parties—Goodwill—Injunction.

Three brothers, C. F. D., G. F. D., and R. D., carrying on business as bakers in the city of L., entered into an agreement with P., another baker in the same city, whereby both businesses were put into a joint stock company. C. F. D. retired from the business, and he covenanted with G. F. D., R. D., and P. jointly not to carry on the business of baker in the city or within ten miles of it for ten years.

Subsequently G. F. D. and R. D. retired from the company and gave up business, and two other brothers, J. D. and A. D., started a new business as bakers in the city, and C. F. D. assisted them in making and distributing bread, but, as he said, simply as a volunteer.

Held, that his so doing was engaging in the business of baker in the said city, and was as much a breach of his covenant as if he had done so for hire.

Held, also, that either the plaintiff P. or the company could maintain the action for an injunction, and that it was properly constituted by both being made plaintiffs, with C. F. D., G. F. D., and R. D. as defendants.

Held, also, that it was no answer to the relief sought that G. F. D. and R. D. had ceased to carry on business.

An injunction was granted.

Macbeth, Q.C., for the plaintiffs.

Hellmuth, *A. Casey*, and *J. H. A. Beattie*, for the defendants.

[14TH MARCH, 1900.

ANGLO-CANADIAN MUSIC PUBLISHING ASSOCIATION v. SOMERVILLE.

Costs—Infringement of copyright—Consent judgment—Damages—Amount of—Reference—Offer—Payment into Court.

Where judgment was pronounced by consent declaring that the defendant had infringed the plaintiffs' copyright, restraining him from continuing to infringe, and directing a reference to ascertain the damages sustained by reason of the infringement, and the Master found that the damages were only $6.70, and also reported specially that the plaintiffs were aware before action that the defendant was willing to hand over all copies of and to stop selling or giving away the publications in question, but the plaintiffs demanded $100 compensation, and that after action the defendant offered to pay $25 for damages and costs, and to deliver up any of the publications on hand, and to give an undertaking that there would be no further infringement, but the plaintiffs did not accept the offer:—

Held, that the plaintiffs were entitled to the costs of the action.

Cooper v. *Whittingham*, 15 Ch. D. 501, *Upmann* v. *Forester*, 24 Ch. D. 231, and *Wittman* v. *Oppenheim*, 27 Ch. D. 260, followed.

And also to the costs of the reference, the defendant not having when consenting to judgment offered to pay a fixed sum for damages and to pay it into Court.

Laing, for the plaintiffs.

W. Roaf, Q.C., for the defendant.

[MACMAHON, J., 14TH FEBRUARY, 1900.

TRUSTS AND GUARANTEE CO. v. TRUSTS CORPORATION OF ONTARIO.

Limitation of actions—Annuity by will—Charge on lands—Arrears—Disability.

A testator by his will devised land to two of his sons, their heirs and assigns, forever, subject to the payment of

$200 per annum for the benefit of another son (a lunatic), for his life, payable "to the person who may be his guardian," and died in 1872. This son lived with his mother, and payments were made to her for his support from 1880 to 1889, the last payment being made in February, 1889. The plaintiffs were appointed committee for the son in December, 1898.

Held, following *Hughes* v. *Cole*, 27 Ch. D. 231, that the annuity was charged on the land, and that the right to recover was not barred as to future payments of the annuity out of the land; that the payments made to the mother were discharges *pro tanto* of the annuity; that, as the son was under a disability until the plaintiffs' appointment, and as twenty years are allowed within which to bring an action in such a case, they were entitled to recover the annuity from February, 1890, and, as the annuity was an express charge on the land, it might be sold to satisfy the arrears.

A. C. Macdonell, for the plaintiffs.

J. T. C. Thompson, for the defendant H. S. Grange.

Aylesworth, Q.C., and *C. A. Moss*, for the other defendants.

[19TH FEBRUARY, 1900.

KELLY v. DAVIDSON.

Master and servant—Injury to servant—Negligence—Foreman—Evidence.

The plaintiff, while working for some contractors who were building a house, was injured through a fall caused by the giving way of part of the scaffolding of the house. The scaffold he was standing on consisted of a single plank about fifteen feet long, one end of which rested on a trestle, and the other on a stay formed of a plank nailed to two upright posts, forming a part of the main structure. The stay as originally fastened to the posts was perfectly secure, as the plank forming the stay rested on its edge on a cleat securely fastened to the posts by spikes, the stay itself being securely fastened to the posts by large spikes. The general superintendent of the defendants' works had been very explicit in directing the

workmen that the stays should be put up and secured as this one had been. Two workmen however removed the stay for purposes of their own convenience about three o'clock on the 7th September, and raised it about a foot above the cleat and nailed it to the posts in a manner which rendered it dangerous. On the following morning, between eight and nine o'clock, the plaintiff and another being directed by the foreman to cut off the ends of two beams at the top of the 3rd storey, the plank referred to was thrown across from the trestle to the stay; and the plaintiff mounting it the stay gave way and the injury happened.

Held, that there was no evidence of negligence on the part of the foreman, so short a time having elapsed between the removal of the stay and the accident, and such removal of the stay, upon which so much trouble had been taken to make it secure, being the last thing a foreman would expect; nor was the fact that after such change was made the plank was up higher at one end than the other sufficient to indicate to him that there had been a change, nor had it caused any comment on the part of the plaintiff, who saw the plank placed in position before mounting it.

H. E. Irwin and *Harris*, for the plaintiff.

Clute, Q.C., and *A. R. Clute*, for the defendants.

IN CHAMBERS

[ARMOUR, C.J., 12TH MARCH, 1900.

SPEARS v. FLEMING.

Summary judgment—Rule 603—Recovery of land—Money claim—Counter-claim—Trial.

The defendant having entered into possession of land which he had contracted to purchase from the plaintiffs, and having, as alleged, made default in payment of instalments of the purchase money, the plaintiffs brought an action against him to recover possession of the land and also for a money demand. The writ of summons being specially indorsed, and the plaintiffs having moved for summary judgment

under Rule 603, the defendant set up that he had been induced to enter into the contract by fraud and misrepresentation, for which he intended to counterclaim, and that nothing was due to the plaintiffs in respect of their money demand. The Master ordered judgment for the recovery of the land, but stayed the operation of it until after judgment upon the plaintiffs' other claim and the defendant's counterclaim, which he allowed to go to trial.

Held, reversing this order, that many serious questions might arise at the trial as to the recovery of the land and the terms upon which it might be recovered, and the trial Judge ought not to be hampered with a final judgment for the recovery of the land in adjudicating upon the questions likely to arise upon the trial of the action.

J. H. Moss, for the plaintiffs.

Lindsey, Q.C., for the defendant.

In the General Sessions of the Peace for the County of York.

[McDougall, Co.J., 21st March, 1900.

REGINA v. ALBERTIE.

Sunday—Lord's Day Act—Victualling house keeper—Supplying food—Ice cream.

Held, under the circumstances set out in the opinion, that supplying ice cream to the complainants on a Sunday was the supplying a refreshment in the nature of a light meal in the ordinary course of the defendant's business as a victualling house keeper, and was not an offence against the Lord's Day Act, R. S. O. c. 246.

A person carrying on the business of a victualling house keeper cannot make any distinction as to whom he supplies, or what he supplies, provided it is food or victuals; and "ice cream" is a food.

An appeal by the defendant from a conviction under the Lord's Day Act, R. S. O. c. 246.

The facts were as follows:—The defendant carried on an eating house or victualling house at 366 Yonge street, in the city of Toronto. He kept soda water and a small stock of

"candies" which during the week he disposed of to customers. His eating house was largely patronized by students attending the universities and colleges, many of whom got their meals by the week, which of course included Sundays. The defendant swore that during the college season he boarded as many as 75 students. For seven years past he had carried on this business, supplying meals to any applying on Sundays as well as week days. His place is kept open on Sundays only to supply meals. In addition to the ordinary bill of fare the defendant provided for his customers ice cream. It appeared he had a fixed charge to the students and other boarders, either by the week or meal, for meals according to a regular bill of fare. Ice cream was not included in the price of a meal, but was extra. He stated that some students, instead of eating the meal in his eating house, sometimes bought prepared food cooked on the premises and took it to their rooms. Other customers purchased food cooked by him, such as cakes or pies. Ice cream also was sold to customers and eaten on the premises by persons who did not partake of a meal set out in the bill of fare. His business, however, was that of an eating house or victualling house. The sale of "candies" was only an incidental feature. In the college season his regular customers for meals would average as many as 125 daily. On Sundays he did not sell "candies," but confined his business strictly to the supply of meals and ice cream and soda water if asked for.

On Sunday the 25th June, 1899, Constables Ironsides and Guthrie entered the defendant's place of business and ordered two dishes of ice cream from the defendant, and sitting down consumed the same on the premises, paying for the same ten cents each. The defendant said that in June and July he had perhaps 15 or 20 regular customers daily for meals and four regular weekly boarders, who got all their meals at his place. The defendant also held a license from the city for carrying on a victualling house. An information was laid for the selling of ice cream on Sunday by the constables, and a conviction was made for breach of the Lord's Day Act. The magistrate was asked to state a case for the opinion of the Superior Court. He declined this request on the ground he had no power to do so, but noted on the depositions that in his judgment the case was one in regard to

which the opinion of the Superior Court should be obtained. He fined the defendant $1 and costs, it being understood that the case was to be treated as a test case and carried further.

An appeal was then taken to the Sessions, and was heard on the 27th January, 1900, and evidence was called. The defendant gave his own testimony, which established the facts above stated. Dr. Fotheringham, called by the prosecution, said that ice cream was undoubtedly a food. He said anything taken into the body which nourishes the body cells is a food. That soda water in a strict sense is also a food.

Robinette, for the appellant.

J. A. Paterson and *A. E. O'Meara*, for the prosecution.

McDOUGALL, Co. J.—The legal points were very fully and ably discussed by counsel.

The information reads:—"That John E. Albertie, being a tradesman carrying on business at the city of Toronto, in the county of York, on the 25th June, 1899, being the Lord's Day, at the city of Toronto aforesaid, at his shop 366 on Yonge street in the said city, unlawfully did sell and publicly shew forth and expose for sale certain goods and chattels and other personal property, thereby doing and exercising the worldly labour, business, and work of his ordinary calling by selling, amongst other goods, two glasses of ice cream (the same not being the conveying of travellers or Her Majesty's mail by land or water nor the selling of drugs and medicine nor other works of necessity nor works of charity), contrary to the form of the statute in such case made and provided."

I will first consider the statutes bearing on the subject. 29 Car. II. c. 7 is the starting point of legislation applicable to the observance of the Lord's Day, so far as it affects Ontario. It is entitled "An Act for the better observance of the Lord's Day commonly called Sunday." (The title of R. S. O. c. 246 is "An Act to Prevent the Profanation of the Lord's Day.") The principal sections read as follows:—

"That all the laws enacted and in force concerning the observation of the Lord's Day and repairing to the church thereon be carefully put in execution; and that all and every person and persons whatsoever shall on the Lord's Day apply themselves to the observation of the same by exercising

themselves thereon in the duties of piety and truth generally, publicly and privately, and that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise worldly labour, business, or work of their ordinary calling upon the Lord's Day or any part thereof (works of necessity and charity not excepted).

Section 3: "Nothing in this Act contained shall extend to the prohibiting of the dressing of meat in families or dressing or selling of meat in inns, cook shops, or victualling houses, for such as otherwise cannot be provided, nor to the crying or selling of milk before 9 o'clock in the morning or after 4 o'clock in the afternoon."

Our Revised Statute c. 246 is practically a re-enactment of the principal sections of 29 Car. II. c. 7, with some slight alterations or additions to the class of persons subject to its provisions. To the words tradesman, workman, artificer, labourer, are added "merchant, farmer, mechanic." The words "publicly cry" are omitted; the words "exposed to sale" are changed to "to sell or publicly shew forth or expose or offer for sale or to purchase." The words "wares, merchandise, fruits, herbs, goods and chattels, whatsoever" are altered to "goods, chattels, or other personal property or any real estate whatsoever." The words of the exception of the original Act "works of necessity and charity" are enlarged to read "conveying travellers or Her Majesty's mail by land or by water, selling drugs and medicine, and other works of necessity and works of charity." The proviso of the original Act excluding from its operation "the dressing of meat in families or dressing or selling of meat in inns, cook shops, or victualling houses" is not repeated in our Act. It is quite clear that the Act of 29 Car. II. c. 7 is an Act *in pari materia* with our Act. It was unquestionably in force in Canada until our 8 V. c. 45, when the Legislature of Canada passed the Act which is now R. S. O. c. 246. The only change in the language of s. 1 of c. 45 of 8 V. made in our present Revised Statute c. 246 is the addition of the word "farmer" inserted in 1896. In *Regina* v. *Barnes*, 45 U. C. R. 276, Hagarty, C.J., in effect holds that 29 Car. II. c. 7 was in force in Canada at least down to 8 V. c. 45.

In *Palmer's Case* (1784), 1 Leach C. C., 3rd ed., 393, where Acts of Parliament are *in pari materia*, the twelve

Judges laid down the rule that such Acts "are to be taken together as forming one system and as interpreting and enforcing each other." Hardcastle on Statute Law, at p. 148, makes the following remarks: "Another rule with regard to the construction of statutes *in pari materia* is that any doubtful decision as to the meaning of one is, as Buller, J., said in *Regina* v. *Mason*, 2 T. R. 586, "a sound rule of construction for the other." In that case the question was whether an indictment under 30 Geo. II. c. 24 for obtaining money by false pretences was good if it did not show what the false pretences were. It appeared that it had been held in *Rex* v. *Muncz*, 2 Str. 1127, that an indictment for procuring a promissory note by false tokens under 33 Hen. VIII. c. 1 was bad because it did not specify what the false tokens were. "30 Geo. II. c. 24," said Buller, J., "only enlarges the description of the offence in the statute of Hen. VIII. Both statutes are made *in pari materia*, and whatever has been determined in the construction of one of them is a sound rule for the construction of the other. The judgment was arrested in the case in Strange because the indictment did not specify the false tokens; therefore by the same reason an indictment on 30 Geo. II. c. 24, which speaks of false pretences, must state what the false pretences are; otherwise the indictment is bad."

This rule also appears to hold good with regard to a colonial Act *in pari materia* with an English Act. Dr. Lushington in *Cotteral* v. *Sweetman*, 9 Jur. 954, said: "I must construe an Act of New South Wales as an Act *in pari materia*; and I conceive (though I know of no direct authority for the position) that an Act of a colonial legislature where the English law prevails, must be governed by the same rules of construction as prevail in England, and that English authorities upon an Act *in pari materia* are authorities for the interpretation of the colonial Act. I think that is true as a general principle." Where a colonial legislature re-enacts in substantially the same terms a British Act not originally applying to the colony, the adopted enactment is to be construed in the colony in the same way as the original enactment. The two are to be treated as being *in pari materia*: *Trimble* v. *Hill*, 5 App. Cas. 342. We thus have

dicta which indicate the rule of construction in the two cases. First, where the English law originally applied to the colony and the colonial legislature passed an Act *in pari materia* with the original English Act, and second, where a colony not subject to the original English Act passes an Act substantially a re-enactment of an existing or former English Act.

The only difficulty arising in the present case in dealing with a victualling house is from the omission in R. S. O. c. 246 of the proviso or exception contained in 29 Car. II. c. 7 relating "to the dressing of meat in families or the dressing or selling of meat in inns, cookshops, or victualling houses." In *Mayor of Portsmouth* v. *Smith*, 10 App. Cas. 371, Lord Blackburn says: "Where a single section of an Act is introduced into another (subsequent) Act it must be read in the sense which it bore in the original Act from which it is taken; and, secondly, it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated into the new Act. I do not mean that if there was in the original Act a section not incorporated which came by way of proviso or exception on that which was incorporated, that it should be referred to; but all others, including the interpretation clause, if there be one, may be referred to." Our law therefore relating to the observance of the Sabbath depends upon a statute passed by our Legislature adopting substantially an English Act which had been in force in England for 168 years and in Canada for over 50 years before any legislation of our own upon the same subject. Under the original Act the ordinary work carried on in private families and the business carried on in inns, cookshops, and victualling houses were exempted from the prohibition of the statute. It would appear that the earlier English Legislature considered that the ordinary work performed in families and by innkeepers, cookshop and victualling house keepers, might not be within the exception in the first section of the Act, described as works of necessity and charity, and therefore inserted a special proviso in the Act declaring that nothing in the Act contained should be held to extend the prohibition to such work.

It is not necessary in the strictest sense that food should be prepared on Sunday for a private family. It could easily

and equally well be prepared on the Saturday, and the family could thrive satisfactorily and sustain life by eating cold victuals on Sunday. The man who lives in rooms, and has no cooking arrangements, can provide for his wants by buying cooked food required by him for Sunday on the day previous. The same reasons would apply to a hotel. A strict construction of the word "necessity" would not require hot meals to be served to the guests on Sunday; cold ones, though perhaps not so palatable, would prevent any actual suffering on the part of such guests. The livery stable keeper or coach proprietor, the driver of the stage coach, according to decided cases, could ply his ordinary calling on Sunday under *Sandiman* v. *Breach*, 7 B. & C. 96; the cabman under *Regina* v. *Somers*, 24 O. R. 244; and until 1896 (59 V. c. 62, O.), the farmer under *Rex* v. *Cleworth*, 4 B. & S. 927; but the private family, the inn, the boarding house and eating house, on a strict construction of our statute, might become law breakers if they did the usual work necessary to provide hot meals or afford facilities for the public to procure food or sustenance on Sunday. That is doubtless the logical conclusion if the proviso contained in 29 Car. II. c. 7 is not to be read into our statute, or if its legal effect is not considered in interpreting our own statute.

The effect of an excepting proviso according to the ordinary rules of construction is to except out of the preceding portion of the enactment something which but for the proviso would be within it. In *Mullins* v. *Treasury of Surrey*, 5 Q. B. D. 170, Lush, J., says: "When one finds a proviso to a section, the natural presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the proviso." In that case, however, the Divisional Court, in which Mr. Justice Lush gave judgment, in construing the Act in question entirely rejected the proviso —a course admitted by the Court to be a very strong thing to do.

It must probably be assumed that in adopting the provisions of 29 Car. II. c. 7 our legislature intentionally omitted to re-enact the proviso. Our Act has therefore to be construed without it, and its omission compels the Court to place a meaning upon the words "works of necessity."

Necessity, or rather what constitutes a work of necessity, depends to a great extent upon circumstances. It cannot be determined by any fixed rule, and must therefore be dealt with in each particular case rather as a question of fact than of law. In an American case *Johnson* v. *Commonwealth*, 22 Pa. St. 108, Woodward, J., speaks as follows:—"It is impossible to lay down any general rule as to works of charity and necessity. If the works enumerated in the proviso of the statute be taken as a legislative sample of work of necessity, it might be said in general that, to supply the ordinary demands of our physical needs and to relieve from situations of peril and exposure, are necessary acts which incur no blame . . . Still the exigencies of human life which demands works of charity and necessity are so numerous and so diversified by attending circumstances as to defy classification and to forbid the attempt to prescribe a general rule." In another case *Commonwealth* v. *Simpson*, 97 Mass. 409, Hoar, J., said: "To save life or prevent or relieve suffering and this in the case of animals as well as man; to prepare needful food for man and beast; to save property as in the case of fire, flood, or tempest, or other unusual peril, would unquestionably be acts falling within the exception."

It is a necessity to provide and prepare food in the private family on Sundays as well as week days. There are others who have no home or family, and whose habit and custom it is to have others provide and prepare food for them. I think that such preparation and such supplying of food is a necessity also.

It must be further borne in mind that R. S. O. c. 246 is a penal statute, and must therefore be construed strictly. Blackstone defines this rule in very clear language. "The law of England," he says, "does not allow of offences by construction, and no case shall be holden to be reached by penal laws but such as are within both the spirit and the letter of such law." The modern rule has probably grown to be a little more liberal; and in *Lyon's Case*, Bell C.C. 38, at pp. 45, the Court says: "A hundred years ago the statutes required to be perfectly precise, and resort was not had to a reasonable construction of the Act, and criminals were thereby often allowed to escape. . . . This is not the present

mode of construing Acts of Parliament. They are now construed with reference to the true meaning and real intention of the Legislature." The punishment will not be extended to cases not clearly embraced in the Act. In *Dickinson* v. *Fletcher*, L. R. 6 C. P. 7, Brett, J., thus expresses the modern rule for the construction of penal statutes. "Those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that under the circumstances it has been incurred. They must fail if the words are merely equally capable of a construction that would and that would not inflict the penalty."

Some light may be thrown on the subject under consideration by examining one or two cases decided under the English Lord's Day Act. Mr. Justice Buller in the case of *Rex* v. *Younger*, 5 T. R. 449, in commenting on the provisions of 29 Car. II. c. 7, states that "The words of the statute are vague and indefinite. First, there is an exception as to works of necessity and charity; then there is a proviso that the Act shall not extend to inns, cookshops, or victualling houses for such as otherwise cannot be provided. Both these expressions are extremely loose, and no certain line can be drawn as a pure question of law." The question involved in *Rex* v. *Younger* was whether a baker was properly convicted for having baked dinners on Sunday—admittedly for people who "could otherwise have provided for themselves." Mr. Justice Grose in the same case thus deals with the meaning of the Act: "The question is not whether baking for this or that man is a trade, but whether the trade of baking carried on in this way be a work prohibited by the statute. . . . The crime imputed to the defendant is having baked dinners on a Sunday. There cannot be any distinction between dressing dinners for the poor and the rich, as far as respecting the baker. It is admitted that dinners for the former may be dressed; then it is to be taken that it would be no crime to bake for a man who is too poor to bake at home, and yet that the baker must be convicted on a penal law for baking for another person who happens to be able to bake at home, a circumstance of which the baker cannot be cognizant. The case therefore seems to me to come within the proviso relating to cookshops." Lord Kenyon, C.J., in the same case says: "I am for an observation of the Sabbath, but not for a Pharisaical

observation of it. But must the labouring part of the community, who are entitled to some indulgence for the labours of the past week, fare harder on that than any other day. They must be fed on that day, as many of them have not the means of dressing their dinners at home; and thus the defendant will, if this defendant be convicted, be prevented from observing the Sabbath. That day will be better observed if the construction put upon the law in *Rex* v. *Cox* be now adopted than if we overruled that determination and adjudge this to be an offence. That decision falls within the reason of the law; and I am glad to find that it is an authority for us at present." The conviction was quashed. See also *Rex* v. *Cox*, 2 Burr. 786.

In the case of *Rex* v. *Ivens*, 7 C. & P. 213, an indictment was preferred against an innkeeper for refusing to receive a person on Sunday night into his inn. The innkeeper insisted on knowing where the applicant was from, and his name, etc., etc. Lord Coleridge in charging the jury said: "The law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one you shall come to my inn and to another you shall not, as everyone coming and conducting himself in a proper manner has a right to be received, and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers and supplying them what they want." And again: "In the case it further appears that the wife of the defendant had a conversation with the prosecutor in which she insisted on knowing his name and abode. I think that an innkeeper has no right to insist on knowing any of those particulars, and certainly you and I would think an innkeeper very impertinent who asked either the one or the other of any of us." In another part of his directions to the jury Lord Coleridge stated: "The only valid excuse that the innkeeper could make for not receiving a guest was that his inn was full." The innkeeper was duly convicted and fined twenty shillings for not receiving the prosecutor, who applied for lodging at the inn between 11 and 12 o'clock on Sunday night.

After careful consideration of the whole case, I cannot attribute to the Legislature of 1845 an intention to make the

law more strict in Canada than it had been in England. It used more perspicuous language in defining the work or labour prohibited and the classes of persons to be affected by the statute. It added the words "merchant and mechanic," and later "farmer;" but it cannot be conceived that by omitting the proviso they intended that private families, innkeepers, cookshops and victualling houses, should be taken to be included in the prohibited clause. Modern habits and customs, especially in towns and cities, have become exacting in the matter of daily comforts. The modern citizen is accustomed in the matter of eating and drinking to substantially the same conditions on Sunday as on week days, and this has become in a modified sense a necessity. In the artificial life developed in cities a large number of people depend on other persons to supply them with food and drink on all days in the week. Hundreds, probably thousands, of persons in a city as large as Toronto eat all their meals outside of the places in which they lodge, and to hold that the persons who cater to such people for their three meals a day are to be prohibited from providing such meals to them on Sunday would require more explicit and emphatic language on the part of the Legislature. If the absence from our statute of the proviso of 29 Car. II. c. 7 makes it a penal offence for a domestic servant under monthly contract to cook her master's Sunday dinner, or for boarding house keepers or eating house keepers to pursue their ordinary calling on Sunday of furnishing three hot meals a day to their lodgers or boarders, or meals to casual customers, it will be a surprise to the public and to the law makers. If, on the other hand, the eating house keeper is within the exception of the statute because carrying on a work of necessity, is it reasonable under such a construction to determine what his customer shall eat? Is he to be excused from the penalty if he furnishes to one customer a cut from a hot joint, some vegetables, and a cup of tea or coffee, but liable to the penalty should he supply to another customer (in his eating house), a dish of ice cream and a glass of water, or a biscuit and a glass of milk? If it is lawful for an inn keeper or an eating house keeper to supply meals on a Sunday, is he bound to catechise his customers and satisfy himself before serving them that they are hungry and need

food to refresh them, or must he refuse them any trifling refreshment short of a full course dinner? Must he, in other words, satisfy himself in the first place of the necessity, and being assured of that, must he, and not the customer, determine what the customer is to be allowed to eat? It was suggested on the argument before me that possibly the law would not prevent an eating house keeper from supplying meals on Sunday to regular weekly boarders, but, on the other hand, it was urged with great confidence that it was distinctly illegal to provide or sell meals to a casual cutsomer however great his want. That it was improper for the eating house keeper to open his front door to do business with the general public, and the question of necessity could not arise in the absence of contractual obligation. I entirely dissent from this view. I look upon an innkeeper and victualling house keeper as being within the same protection and possessing similar privileges. An inn is defined in Stroud as "a house in which travellers, passengers, wayfaring men, and other such like casual guests, are accommodated with victuals and lodging, and whatsoever they reasonably require for themselves and horses, at a reasonable price." A victualling house is defined "as a house where persons are provided with victuals, but not lodging." Victuals are defined as comprising everything that is food for man and everything which, when mixed with something else, constitutes such food: see *Rex* v. *Hodgins*, 10 B. & C. 74. The victualling house keeper and innkeeper provide for the public, the first food or victuals, the second, food or victuals and lodging. Each are equally necessary to the community, not alone for six days in the week, but for the whole seven days. Whether the customer is rich or poor, a boarder by the day or week, or a casual visitor, I think can make no difference.

If then it be lawful for an eating house keeper to carry on his ordinary business on the Lord's Day as a work of necessity, then I am of the opinion that it is immaterial whom he supplies, or what he supplies, so long as it can fairly be considered food or victuals in any one of their numberless variations, and for so supplying the keeper is not punishable for a breach of the Lord's Day Act. If he is protected in supplying meals, he is protected in suiting the

taste of his customers as to the article of food required. As I have said before in an earlier part of this opinion, I am satisfied from the evidence that the defendant was carrying on on Sunday the 25th June, 1899, the date of his alleged offence, strictly and exclusively, his business as a victualler. His candy department, if the small stock he carried can be so described, was closed to the public.

I am of the opinion, under all the circumstances of the case, that supplying the constables with the ice cream was the supplying of refreshment in the nature of a light meal in the ordinary course of his business as an eating house keeper or victualling house keeper, and was not an offence under the statute.

It may be interesting to note that in England, under 34 & 35 V. c. 87, no prosecution for an offence under 29 Car. II. can be prosecuted, except with the written consent either of the chief of police of the police district, or of two justices, and if obtained in the latter manner, the case cannot be heard before the justices giving the consent.

The conviction will be quashed, but, under the circumstances of this appeal being treated as a test case, without costs.

NOVA SCOTIA.

In the Supreme Court.

[FULL COURT, 12TH MARCH, 1900.

In re FITZPATRICK.

Liquor License Act—Licensed premises—Neighborhood of railway—Prohibition of statute—Refusal of mayor to sign license—Mandamus.

Decision of TOWNSHEND, J., in Chambers, 19 Occ. N. 396, affirmed on appeal.

In re MARSHALL.

Parent and child—Custody of infant—Religious faith—Conduct of parent —Estoppel.

On appeal from the decision of TOWNSHEND, J., in Chambers, 19 Occ. N. 364, WEATHERBE and MEAGHER, JJ., were in favour of allowing the appeal with costs; HENRY and GRAHAM, JJ., were in favour of allowing the appeal upon the appellant, the father of the infant, giving an undertaking not to interfere with her religious training by force or undue persuasion; and RITCHIE, J., was in favour of dismissing the appeal with costs.

Held, by the majority, that the father had been guilty of no conduct which should deprive him of the comfort of his daughter's companionship and the direction of her education.

MILLER v. ARCHIBALD.

Pleading—Leave to reply—Time expired—Merits.

Decision of HENRY, J., in Chambers, 19 Occ. N. 400, reversed, on the ground that he acted on a wrong principle in refusing the plaintiff leave to reply. The plaintiff should have been allowed to take the $1 out of Court and proceed to trial to see if she were entitled to any more.

MICHÆLS v. MICHÆLS.

Husband and wife—Promissory note of husband—Indorsement to wife— Recovery on—Contract—Separate property—Married Woman's Property Act, 1898—Form of indorsement.

On appeal from the decision of RITCHIE, J., 17 Occ. N. 326, the Court was equally divided in opinion.

Held, per MCDONALD, C.J., and WEATHERBE, J., that the appeal should be allowed on the ground that under the Married Woman's Property Act, 1898, a wife can sue her husband for all property not acquired from him.

Per MEAGHER and TOWNSHEND, JJ., that the appeal should be dismissed on the ground that the note being made

by the husband to a third party, and indorsed to the wife, the indorsement transferred the entire contract to the wife, which contract was one by the husband to pay such person as the note might be indorsed to, which in the event was his wife; and at common law a wife could not in such a case sue her husband, and, as the property or chose in action was derived from the husband, and not otherwise, there was nothing in the Act of 1898 authorizing this form of indorsement.

McLAUGHLIN CARRIAGE CO v. PETTIPAS.

McLAUGHLIN CARRIAGE CO v. HAVERSTOCK.

Promissory note—Payment to agent—Authority to collect—Estoppel.

Actions on promissory notes made by the defendants respectively for the price of certain waggons, indorsed by the payee, before maturity and for valuable consideration, to the plaintiffs.

The only defence pleaded was payment to E. H. Oland, the payee, who was, as the defendants alleged, the agent of the plaintiffs to collect the amounts of the notes.

It was admitted that Oland was the agent to sell and had sold the waggons, and it was proved that many persons had previously paid Oland money, and that the plaintiffs had received money from Oland from time to time as it had come into his hands, but it was not shewn that the defendants knew of this last circumstance so as to be led by it to make payments to Oland. It was proved that Oland had not remitted to the plaintiffs the money paid to him by the defendants. In the first case one of the payments relied on consisted in the taking by Oland of a lease at the valuation of $20, to be credited on the notes.

Held, that the plaintiffs being the legal holders and having the notes in their possession, in the absence of direct authority to the agent to collect, or of estoppel, the defendants were liable.

Held, also that, even if the defendant Pettipas was justified in thinking that Oland was authorized to collect money for the plaintiffs, the horse transaction could not be regarded as equivalent to a payment.

D. McNeil and *W. F. O'Connor*, for the plaintiffs.

Lenoir and *Notting*, for the defendants.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 10TH MARCH, 1900.

CLOUTIER v. GEORGESON.

Assignment—Executions Act, R. S. M. c. 53—Exemptions—"Necessaries"—Conversion—Waiver.

The plaintiff carried on business as a retail dealer, and occupied a shop as tenant. He made an assignment to the defendant of all his goods, stock in trade, and shop fixtures, and all his personal estate, to the extent only to which the same might be made liable under an execution or judgment. This instrument conferred on the assignee an express power of sale. With the consent of the plaintiff, the defendant entered upon the premises and made an inventory of the stock, in which were included, with the consent of the plaintiff, a quantity of shelving, drawers, and counters valued at about $700, a staircase valued at $100, and some tables, chairs, and other shop furniture, valued at $501.10, which the plaintiff subsequently claimed as necessaries used by him in his business.

The defendant put up for sale all the goods shown in the inventory, but before the sale had been completed the plaintiff's solicitors notified the defendant that the plaintiff claimed the "fixtures" in the shop as not being liable to execution. About the same time the landlord claimed the shelving, drawers, and counters.

In closing the sale these articles and the staircase were excluded, and the defendant left them upon the premises where he found them.

After the completion of the sale the plaintiff asserted that the goods mentioned as valued at $501.10 were exempt from seizure under execution, and did not pass by the assignment; and this action was brought to recover their value.

The cause was tried before RICHARDS, J., who found that the plaintiff had waived his right to claim the goods as exemptions; and judgment was entered for the defendant.

The plaintiff appealed. His contention was that the goods came within s. 43 (*f*) of the Executions Act, R. S. M. c. 53, exempting from seizure "the tools, agricultural implements, and necessaries used by the judgment debtor in the practice of his trade, profession, or occupation, to the value of $500."

Held, that the appeal should be dismissed with costs.

It did not appear that the defendant committed any act with reference to the shelving, drawers, or counters, which would have rendered him liable to an action. There was no evidence of actual interference with them. What was done was with the plaintiff's consent. The uncompleted sale would not amount to a conversion: *Fowler* v. *Hollins*, L. R. 7 Q. B. 616; *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495. The defendant did not hand over the property to the landlord or recognize or concur in asserting the landlord's claim. He merely abandoned the premises, leaving the goods where he found them.

Without entering into the question whether the plaintiff would have been entitled to exemption from execution in respect of the goods sued for, the defendant having appropriated only a portion of those of the same kind, and having left over $500 worth, he could not be liable to an action for the value, or the proceeds of the portion sold.

Howell, Q.C., and *Mathers*, for the plaintiff.

Tupper, Q.C., and *Phippen*, for the defendant.

BLANCHARD v. MUIR.

Judgment—Life of—County Court judgment—Transcript to Queen's Bench—Examination of judgment debtor—Commencement of statutory period.

Appeal from an order of BAIN, J., dismissing an application by the plaintiff to enforce the attendance of the defendants for examination as judgment debtors

In May, 1889, the appellant recovered a judgment in a County Court, and in December, 1892, he filed a transcript in the Queen's Bench under s. 193 of the County Courts Act, R. S. M. c. 33. In January, 1900, an appointment was obtained from a special examiner for the examination of the judgment debtors under Rule 732 of the Queen's Bench Act, 1895. The defendants failed to appear, and an application was made to commit them, or to enforce their appearance. This was refused on the ground that the applicant was not entitled to enforce the judgment, it being considered to have been barred by s. 24 of R. S. M. c. 89.

The question was whether the "present right to receive" the sum secured by the judgment accrued upon the recovery of the original judgment in the County Court or upon the filing of the transcript in the Queen's Bench.

Held, that the judgment in the Queen's Bench did not constitute a fresh adjudication, but merely afforded other or more effective remedies, and gave no new right to receive the money secured by the judgment. The right to enforce the judgment was barred at the expiration of ten years from the recovery of the original judgment in the County Court; and the appeal should be dismissed with costs.

Elliott, for the plaintiff.

Aikins, Q.C., and *Nason*, for the defendants.

In re H., A SOLICITOR.

Solicitor and client—Taxation—Solicitors' Act, 6 & 7 V. c. 73. (Imp.)—Review of taxing Master's report—Discretion of Master—Payment to solicitor out of jurisdiction as agent of client.

Upon appeal from the decision of DUBUC, J., 19 Occ. N. 290, it was reversed in so far as it varied the certificate of the taxing officer.

Held, that there was not sufficient evidence that the Toronto solicitors were authorized to bind the company by the receipt of any of the money. Their position as general solicitors of the company involved no such authority of itself. A portion of the cheque was paid to the Toronto solicitors for their own use. The intention was to allow them half the fees charged by the Winnipeg solicitor, and that was what was paid by that portion of the cheque. It might be that the Toronto solicitors were not entitled, as between themselves and the company, to derive a profit from the transaction, or that such an allowance to them was a breach of the Law Society Act, but since the Winnipeg solicitor chose to make them the payment for themselves, he could not subsequently insist that it was received by them for the company.

[BAIN, J., 28RD FEBRUARY, 1900.

KNOX v. MUNRO.

Master and servant—Contract of hiring—Special agreement—Quantum meruit—Non-fulfilment of contract.

County Court appeal. The dispute was as to the terms on which the plaintiff was hired by the defendant. The plaintiff stated that he was hired by the month at $17 a month; the defendant asserted that the hiring was for a definite period of 8 months for $130; the weight of evidence, as far as the notes of the evidence shewed, was decidedly in favour of the defendant.

From a memorandum furnished by the County Court Judge it appeared that he entered the judgment he did for the plaintiff, not because, in the conflict of evidence, he believed the plaintiff's evidence and disbelieved that of the defendant, but because he thought that the minds of the parties did not meet as to the term or duration of the intended contract, and that, as the plaintiff had worked four full months, he should be allowed for that work on a *quantum meruit*, at the rate approximately of $130 for eight months.

Held, that it might be that the plaintiff misunderstood the legal effect of the contract he made; but it must be considered

that he engaged for eight months for $130. As no time was specified for the payment of the $130 under the special agreement, it would not become payable until the plaintiff had performed the work, which was the consideration for the payment. Having left before the end of the eight months, he could not be entitled to the $130, and, as he left without any valid reason, he was not entitled to recover any portion of the $130 for the part of the time that he worked: *Cutter* v. *Powell*, 2 Sm. L. C. 1; *Turner* v. *Robinson*, 5 B. & Ad. 789; *Tilley* v. *Elwin*, 11 Q. B. 742. When the plaintiff left work the special agreement was still subsisting; no new contract can be implied from acts done under an express contract which still subsists: *Cutter* v. *Powell, supra*; *Brittain* v. *Rossiter*, 11 Q. B. D. 123.

The plaintiff was not therefore entitled to recover anything on a *quantum meruit* for the work he actually did.

Cameron, for the plaintiff.

West, for the defendant.

BRITISH COLUMBIA

In the Supreme Court

[FULL COURT, 23RD FEBRUARY, 1900.

BANK OF BRITISH COLUMBIA v. OPPENHEIMER.

Discovery—Affidavit of documents—Sufficiency of description in affidavit — Privilege.

An affidavit of documents which described certain bank books as bill registers, current accounts, and ledgers for stated periods.

Held, sufficient; IRVING, J., dissenting.

Privilege was claimed for the first time in respect of such books in a supplementary affidavit filed subsequently to the issue of a summons for a further and better affidavit.

Held, reversing the decision of MARTIN, J., that this affidavit defeated the summons, and that the claim of privilege must be allowed.

Hunter, for the plaintiffs.

Duff, for the defendants.

[14TH MARCH, 1900.

In re TODD—TODD v. TODD.

Succession duty—Principle of calculation—62 V. c. 68, s. 4.

Under s. 4 of the Succession Duty Act, where the aggregate value of the property exceeds $200,000, only the excess over that amount is subject to a duty of $5 for every $100 of the value.

Maclean, for the Crown, the appellant.

Luxton, for the respondents.

[MC COLL, C. J., 23RD JANUARY, 1900.

In re LEY.

Bankruptcy and insolvency—Assignment for benefit of creditors—Creditors' Trust Deeds Act—Exemption of personal property under Homesteads Act—Remuneration of trustee—Costs.

The debtors, a firm of builders, assigned under the Creditors' Trust Deeds Act all their personal property, credits, and effects that might be seized and sold under execution.

The assets were not sufficient to pay any part of the claims of ordinary creditors, and two members of the firm claimed as exemptions chattels to the value of $500 each (under the Homestead Act) selected out of the lumber and materials around the factory of the firm.

Held, on an originating summons for directions, that by the form of assignment the claimants were precluded from claiming exemption.

Trustee's remuneration fixed at five per centum.

Davis, Q.C., for the trustee.

Williams, for the debtors.

Bowser and *Bull*, for the creditors.

IN CHAMBERS.

[MARTIN, J., 16TH JANUARY, 1900.

BRITISH COLUMBIA FURNITURE CO. v. TUGWELL.

Practice—Style of cause—Firm name—Amendment—Rule 104—Order XIV.

Summons by the plaintiffs for summary judgment under Order XIV.

J. K. Macrae, for the defendant, took the objection that Jacob Sehl was really the plaintiff, and he was suing in a firm name when he was the only member of it. He referred to Rule 104 and *Mason* v. *Mogridge*, 8 Times L. R. 805.

Belyea, Q.C., for the plaintiffs.

MARTIN, J., upheld the objection, and refused the plaintiff an adjournment to enable him to apply to amend the style of cause in the proceedings.

[See also *Lang* v. *Thompson*, 16 P. R. 516.]

In the County Court.

[HARRISON, Co. J., 27TH FEBRUARY, 1900.

REGINA v. WILSON.

Transient trader—License—Occupant of premises—Conviction.

Appeal to County Court Judge from a summary conviction of William Wilson by the police magistrate for the city of Nanaimo.

Held, quashing the conviction, that where goods are consigned by the owner to be sold on commission, and they are sold by the consignee by auction in premises rented by him,

the owner is not an occupant of such premises nor a transient trader within the Municipal Clauses Act, R. S. B. C. 1897 c. 144, s. 171, s.-s. 23, as amended in 1898 by c. 35, s. 19.

Beevor-Potts, for the appellant.

Young, for the respondent.

[BOLE, Co.J., 19TH FEBRUARY, 1900.

TRIM v. BAINES.

Landlord and tenant—Surrender of lease—Estoppel—Malicious civil proceedings—Pleading—Malice—Evidence—Onus.

Action for $350, the balance of rent alleged to be due under a lease of land dated 22nd April, 1895, made by the plaintiff to the defendant, at the yearly rent of $150, for ten years. The defendant relied upon a surrender by operation of law.

In 1896 the defendant and his co-tenant Newton, with the plaintiff's consent, leased a part of the land to one Stanley, who entered into possession and paid the rent of $50 a year direct to the plaintiff, at the request of the defendant. On the 17th April, 1897, according to the defendant's story, at a time when he owed $100 for rent, the plaintiff agreed, in consideration of getting this money, to cancel the lease. This the plaintiff positively denied, saying he got no money on the 17th April, 1897, and made no such arrangement. The receipt alleged to have been given was not produced, nor was its disappearance accounted for. The defendant's evidence was taken on commission, and he was not examined in open Court. No new lease was granted and the plaintiff had not resumed possession.

Held, that there can be no estoppel by mere verbal agreement; there must be, in addition to such agreement, some act which is inconsistent with the continuance of the lease.

Nickells v. *Atherstone*, 10 Q. B. 944; *Oastler* v. *Henderson*, 2 Q. B. D. 579; *Nixon* v. *Maltby*, 7 A. R. 371; and *Gault* v. *Shepard*, 14 A. R. 203, referred to.

And in this case there was no surrender of the lease by operation of law.

2 Sm. L. C., 8th ed., p. 884 *et seq.*; *Wallis* v. *Hands*, [1893] 2 Ch. 75; *In re Panther Lead Co.*, [1896] 1 Ch. 978; and *Seldon* v. *Buchanan*, 24 O. R. 349, referred to.

The defendant counterclaimed for $500 damages against the plaintiff for (*a*) fraudulently and without any colour of right filing a plaint in the County Court claiming a lien; (*b*) causing a *lis pendens* to be issued against lands not included in the lease; (*c*) for registering such *lis pendens*.

Held, that to sustain such an action there must have been, by means of civil process, some unwarrantable interference with the person or property of the defendant in the original action: *Montreal Street R. W. Co.* v. *Ritchie*, 16 S. C. R. 622.

Held, also, that the counterclaim did not disclose a good cause of action, because neither malice and want of reasonable and probable cause nor special damage were sufficiently alleged: *Mitchell* v. *McMurrich*, 22 O. R. 712.

Held, also, that the onus of shewing malice or special damage was upon the defendant: *Brown* v. *Hawkes*, [1891] 2 Q. B. 718; *Malcolm* v. *Perth Mutual Fire Ins. Co.*, 29 O. R. 406, 717; and be had not succeeded in his proof.

As to the necessity for proving malice, see *St. Denis* v. *Shoultz*, 25 A. R. 131.

NORTH-WEST TERRITORIES

In the Supreme Court.

[THE JUSTICES IN BANCO, 2ND DECEMBER, 1898.

In re SALE OF ROAD ALLOWANCE.

Way — Road allowance — Powers of Lieutenant-Governor in Council — Closing-up.

A reference by the Registrar at Calgary to SCOTT, J., who referred it to the Court.

Robson, for the Crown.

Newlands, for the Registrar.

McGUIRE, J., (delivering the judgment of the Court)—The question is as to the power of the Lieutenant-Governor in Council to close up and sell a road allowance. Section 18 of 60 & 61 V. c. 28 (D.) places road allowances under the "direction, management and control" of the Lieutenant-Governor in Council, which probably does not authorize closing up or selling them, but s. 20 of the same Act empowers the Lieutenant-Governor in Council to close up any road allowance or trail which has been transferred to the Territories. Now do the words "which has been transferred," etc., qualify "*road allowance*" or only "*trail.*" If both are qualified, then, since there has been no transfer of this road allowance, it is contended that the Lieutenant-Governor in Council cannot close it or sell it.

An examination of the various sections of the North-West Territories Act and amendments discloses that there are two classes of roads recognized by the statutes:—First, those which existed as such prior to survey or sub-division into sections, and which are always spoken of as particular thoroughfares, public travelled roads, or trails: see s. 108 of the North-West Territories Act, and s. 18 of 60 & 61 V. c. 28. Second, those roads which came into existence by virtue of the Dominion Lands Act upon survey and sub-division into townships and sections, and which are always referred to as "road allowances:" see s. 107 of the North-West Territories Act, and s. 18 as above.

Now, I can find no section which suggests a "transfer" of a "road allowance," whereas all the sections dealing with the first-named class authorize the Governor-General in Council to "transfer" these (more or less absolutely) to the Lieutenant-Governor in Council.

When, therefore, in s. 20 of the Act of 1897 the words "which has been transferred" are used, it is obvious that they are employed to describe "trail" and not "road allowance." This section therefore authorizes the closing of *any* "road allowance," but only such "trails" as have been "transferred," etc. It further gives power to the Lieutenant-Governor in Council to "deal" with the land in these when so "closed," "as he sees fit," which, I take it, enables him to transfer and convey a good title to the land without any authorization from the Crown other than is contained in s. 20.

[6TH DECEMBER, 1898.

GRAVELEY v. SPRENGER.

Chattel mortgage—Description of goods—Sufficiency—Cattle—Identification—Branding—Situation of goods—Locality—Proviso in mortgage—License to mortgagor to sell cattle—Contemporaneous agreement—Consideration—Future advances.

This was an appeal by the plaintiff, the execution creditor, from the judgment of ROULEAU, J., in favour of the defendant, the claimant, in an interpleader issue respecting eighteen head of male cattle, seized by the sheriff of the Northern Alberta Judicial District under an execution issued upon a judgment recovered by the plaintiff against one Muntz.

The defendant claimed the cattle in question under a chattel mortgage made by Muntz to him. This mortgage bore date the 17th July, 1894, and was given by Muntz, who was described therein as of Doniberg Ranche, in the District of Alberta, rancher, to secure the payment to the defendant of $3,600 payable in three years from the date thereof without interest.

The property was described as follows:—"All cattle and horses of whatever age and sex branded 3 on the left side and all increase thereof from time to time until the moneys hereby secured are fully paid, together with the 3 brand and the branding irons for said brand, and all right, title, and interest therein and thereto."

Lougheed, Q.C., for the plaintiff, contended, *inter alia*, that this mortgage was void against him, as an execution creditor of Muntz, for non-compliance with the provisions of s. 8 of the Bills of Sale Ordinance then in force, No. 18 of 1889, inasmuch as it did not, "contain such full and sufficient description of the goods and chattels comprised in it that the same may be readily and easily known and distinguished."

Muir, Q.C., for the defendant.

SCOTT, J., (delivering the judgment of the Court):—The evidence shews that in the spring of 1894 the defendant owned a number of cattle, some of which were branded

"M.S.," and others O, and others 3, in conjunction with one of the other brands mentioned; that all these bearing the 3 brand were only sold by him to Muntz, who gave the mortgage in question upon them.

There is nothing in the evidence to show that any cattle bore the 3 brand other than those sold by the defendant to Muntz and intended by them to be included in the mortgage.

In view of this evidence, I am of opinion that the description in the mortgage was a sufficient compliance with the provisions of the section referred to. In the ranching districts of the Territories, where cattle of different brands are of necessity permitted to graze together on the open prairie, the brands borne by such cattle practically constitute the only means of identification.

For the purpose of such identification it does not appear to me to be necessary that all the brands borne by each animal should be referred to.

Where each animal of a particular band bears several brands, some of which are borne by cattle of other bands, but one and one only of which is borne by all the cattle of that band and by no other cattle, the latter brand would afford the only means of identifying by brands the cattle belonging to that particular band.

Then, as the 3 brand was sufficient to make the identification of the cattle comprised in the mortgage unquestionable, the mention of the locality where they were at the time the mortgage was given was unnecessary. That appears to be necessary only in cases where the property comprised cannot be, or is not described with such certainty as to render identification possible without it: see Barron on Bills of Sale, p. 376 *et seq.*; *McCall* v. *Wolff*, 13 S. C. R. 130.

I can find nothing in the Ordinance referred to which indicates that a mortgage within it should shew on its face that the property comprised was situated within some particular registration district of the Territories, or even that it was within the Territories. The Ordinance merely requires that the mortgage shall be filed within the specified time in the office of the registration clerk of the district in which the

property was situated at the time of its execution; and that requirement appears to have been fulfilled in this case.

The mortgage in question contains the following proviso: "Provided always, anything hereinbefore contained to the contrary notwithstanding, that the said mortgagors shall be at liberty at any time to sell bulls and steers."

It is contended that by reason of this provision the mortgage is not a mortgage of the bulls and steers. The basis of this contention is, that giving the mortgagor the right to sell all the bulls and steers practically revests in him the absolute control of them, and no security or protection in respect of them is afforded to the mortgagee.

The evidence shews that, by an agreement under seal contemporaneous with the mortgage and made between the parties thereto, the mortgagor agreed that he would, for a period of three years from that time, give his whole time and attention to looking after, tending, and maintaining the cattle and horses mentioned in the mortgage, and the mortgagee agreed that he would allow the mortgagor to sell a sufficient number of bulls and steers from time to time as should be necessary to pay the running expenses of the ranche, regard being had to economy. It was also provided that no horses or any other cattle should be sold for any purpose without the consent of the mortgagee in writing.

I think it may reasonably be inferred that the power given by the mortgagee to sell bulls and steers was intended by the parties to be restricted to sales authorized by the agreement, viz., those only which might become necessary in order to pay the running expenses of the ranche. The wider power expressed in the mortgage may have been stated there merely for the purpose of satisfying purchasers from the mortgagor that he had the power to sell them. In that view, the actual power conferred seems to be no wider than the implied power which the mortgagor otherwise would have had to sell cattle in the ordinary course of his business as a rancher: see *National Mercantile Bank* v. *Hampson*, 5 Q. B. D. 177. In fact it may be doubted whether the power conferred is as extensive as the implied power would have been, as under the latter he could have sold not only bulls and steers, but also horses and female cattle.

It is also contended by the plaintiff that the mortgage is void as against him on the ground that the consideration therefor is not duly expressed as required by s. 7 of the Ordinance referred to, inasmuch as the agreement referred to shews that the mortgage does not set forth the terms upon which it was taken; that a creditor searching in the clerk's office and reading the mortgage would not be properly informed of the nature, purpose, and scope of the transaction, which would appear from the agreement to be one for future advances.

The consideration of the mortgage was a debt of $3,600, due by the mortgagor to the mortgagee, and there is nothing in the evidence to shew that there was any further or other consideration.

The mortgagor in his evidence states that he agreed to run the cattle for three years and not pay interest on the money he owed, and that he was to be allowed, besides, the expenses of running the ranche.

I think that in making this statement he was merely referring to the terms of the agreement in writing between him and the mortgagor, and not to any further or other agreement, but, even if there had been such an agreement between them, it was not one which in any way affected the question of the consideration for the mortgage. It was one which related merely to the terms of payment. It, in effect, merely provided that in case the mortgagor took care of the cattle for three years and ran the ranche, he was to be allowed the expense of running it as a payment on the mortgage. Neither is there anything in the written agreement which affects the consideration or shews that it was otherwise than as expressed in the mortgage. Its object appears to have been to provide for the preservation of the mortgaged property during the continuance of the mortgage, and the powers thereby conferred upon the mortgagor appear to have been conferred for the purpose of carrying out that object.

It is true that the written agreement shews that the whole agreement between the parties was not contained in the mortgage, but, as the portion of the agreement outside the mortgage does not affect the question of the consideration,

there appears to be no provision of the Ordinance referred to requiring that it should be so contained.

It was also contended that, because the mortgage permits the mortgagor to sell bulls and steers, it is fraudulent and void as against the plaintiff.

The basis of this contention is that the power is a general one to sell all bulls and steers.

As I have already expressed the view that, by the agreement between the parties, the power was restricted to such an extent that it was not in excess of the implied power under such mortgages, it is unnecessary for me to deal with that contention. At the trial the agreement in writing to which I have referred was tendered in evidence by the defendant. Its reception was objected to on the ground that the mortgage could not be varied by any subsequent agreement. In my view it was one contemporaneous with the mortgage.

In my opinion, the appeal should be dismissed with costs.

PACIFIC INVESTMENT CO. v. SWANN.

Equitable execution — Injunction — Simple contract creditor — Execution before judgment—Discretion—Dissolving injunction.

An appeal by the plaintiffs from the order of SCOTT, J., 18 Occ. N. 97, dissolving an injunction.

McCaul, Q.C., for the plaintiffs.

Muir, Q.C., for the defendant.

WETMORE, J.—This action was brought to recover the amount of a judgment obtained in the High Court of Justice in England, by the plaintiffs against the defendant, and in the alternative to recover alleged calls on stock or shares which the plaintiffs allege the defendant held in their company. The defendant appeared and filed a defence herein. One

Lizzie M. Barter obtained a decree in the Northern Alberta Judicial District of this Court in a certain cause wherein she was plaintiff and the now defendant Swann and others were defendants, whereby the defendant Swann and one Gibb were appointed receivers with the powers of eventually converting the property of the Quorn Ranche Company, limited, into cash and out of the proceeds, after making certain payments and dispositions of the money which were specified, to divide the balance, share and share alike, between the said Lizzie M. Barter and the defendant Swann until Barter was paid $20,000, and some interest. This action being in the position which I have mentioned, and one T. S. C. Lee and the defendant Swann being the receivers in the suit of Barter v. Swann and others, the plaintiff applied to Mr. Justice Rouleau and obtained ex parte an injunction order restraining the defendant Swann, his agents and servants and any one claiming under them, from receiving from the said receivers any property, money, cheque, or security for money, and the receivers from giving, paying, or transferring to such defendant any such property, money, cheque, or other security for money. The defendant thereupon applied to dissolve such injunction order, and Mr. Justice Scott on hearing the parties made an order dissolving it.

The plaintiffs appeal from Mr. Justice Scott's order. It is contended in the plaintiffs' factum (and I think there can be no question rightly so) that by the practice in England such an injunction order could not be obtained before judgment to prevent a debtor from transferring his property or getting in debts due to him, even if it was done for the express purpose of defrauding a creditor and defeating his claim in a pending action. I may say that in the material used before Rouleau, J., on which the injunction order was granted it was alleged that in the belief of the plaintiffs' advocate (who made the affidavit) the receivers were about to sell and dispose of the assets in their hands for the purpose of paying over to the defendant the proportion of the proceeds he was entitled to, with a view of defeating the creditors of the defendant and especially the plaintiffs in this action. I fail to discover in the material used before the learned Judge

any evidence of such fraud or contemplated fraud. It is contended however on the part of the plaintiffs that the condition of affairs in this country is different from what it is in England; that in England a debt due by a third person to a defendant in an action for a liquidated demand cannot be attached before judgment by the plaintiff in the action, but that in this country it can, by virtue of s.-s. 47 of s. 1 of Ordinance No. 6 of 1897; and further that property can in this country be attached before judgment by virtue of s. 394 of the Judicature Ordinance, No. 6 of 1893, as amended by s.-s. 53 of s. 1 of Ordinance No. 6 of 1897; and that consequently, as in England the Courts will give relief in the mode known as equitable execution after judgment to enable the judgment creditor to obtain the benefit of his judgment when an impediment exists which prevents such creditor recovering the amount of his judgment under ordinary process of execution, so the Courts in this country will grant similar equitable relief when a plaintiff before judgment is in a position to issue a garnishee process or attachment, and some impediment exists which prevents the garnishee process or attachment being enforced against the debt or property. It was also conceded at the argument by the plaintiffs' counsel that the application for the injunction was made because the plaintiffs could not prove that the receivers had any moneys in their hands to pay to the defendant.

Assuming for the present that the plaintiffs' contention is correct in the abstract, I am of opinion that this appeal must fail on the ground that the material on which Rouleau, J., made the order for the injunction was not sufficient. As in England a party plaintiff could not get such an order until after judgment or order for payment of money, that is, until he was in a position to issue execution, so in this country he could not get an injunction before judgment until he proved himself in a position to obtain a garnishee process or issue an attachment. Now the plaintiffs in this case were not in a position to obtain a garnishee process, because there is not a particle of testimony swearing positively to the indebtedness of the defendant to the plaintiffs, as required by s.-s. 47 of s. 1 of Ordinance No. 6 of 1897. There is nothing in Mr. McCaul's affidavit to that effect, and, notwithstanding the

examination for discovery of the defendant, it is quite possible that at least some of the matters pleaded in the statement of defence may afford a defence to the action. It would be monstrous that a person's property should be taken away from him or that he should be prevented from dealing with it when neither a judgment has been recovered against him nor any clear sworn testimony is presented showing an indebtedness. Then as to issuing an attachment under s. 394 of the Judicature Ordinance, there is nothing whatever established as required by that section to entitle the plaintiffs to issue such an attachment.

This appeal, however, was brought with a view of having the question of the abstract right to have an injunction order in such cases issued and a receiver appointed, and it would be a matter of some regret if that question was not settled.

Now, I am of opinion that, even if it had been established that the plaintiffs were in a position to issue a garnishee process or an attachment, such an order as that made by Rouleau, J., ought not to have been made. As before stated, it is conceded that in England no such order could be made before judgment; therefore no such order can be made in this country unless there is statutory authority to make it. Authority to make it arises from some legislation. In so far as the order in question is concerned, the only legislation out of which an authority to make it can be spelled or inferred is s.-s. 47 of s. 1 of Ordinance No. 6 of 1897, or s. 394 of the Judicature Ordinance, as amended. As to s.-s. 47 of s. 1 of Ordinance No. 6 of 1897, the only effect of a garnishee summons is to bind debts *due or accruing due.* The decisions of the Court have clearly defined what is meant by debts due or accruing due; they must be *debitum in præsenti*, although it may be *solvendum in futuro. Webb* v. *Stenton*, 11 Q. B. D. 518, is the ruling case on this point. In that case there was no debt due or accruing due from the receivers to the defendant, and, in my opinion, the Legislature having restricted the binding power of the garnishee process to debts of this character, even a Court of equity cannot give a wider effect to the language of the Legislature than the Legislature itself intended. Of course we must assume that the Courts in

putting the construction I have named upon these words gave effect to the intention of the Legislature. As to s. 394 of the Judicature Ordinance (and the same is true of both the provisions of the Ordinance under discussion) the Legislature has provided a means by which and the extent to which the relief can be granted, and I am of opinion that it can be obtained only in the prescribed manner and to the prescribed extent. It must be borne in mind too that the legislation relied on interferes with the common law rights of the subject to deal with his property as he pleases, and the Courts should be very careful how they extend any legislation which affects such rights beyond what the language of the Legislature clearly expresses.

Moreover, I can perceive a very wide difference between invoking the aid of a Court of equity to secure to a person the fruits of a judgment recovered, and invoking its aid under the circumstances under which it has been invoked in this case. When a person has obtained a judgment, it is conclusive against the judgment debtor; the judgment creditor is entitled to have his judgment satisfied; and therefore he has established an unquestionable right to relief, which ought to be respected. In this case the plaintiffs have not established a conclusive right as against their alleged debtor; it may in the event turn out that they have no claim whatever against the defendant, and equity is asked to stretch out its arm to secure to him relief which he may never establish. To say the least, I have very great doubts whether the Court of equity should so exercise its powers unless compelled to do so by clear legislative authority.

I think this appeal should be dismissed and Mr. Justice Scott's order dissolving the injunction affirmed with costs.

ROULEAU, J. (delivering the judgment of the remaining members of the Court, after setting out the facts)—The plaintiffs admitted that such a proceeding would not be entertained in England, because the Courts there will not interfere prior to judgment by injunction or receiver to prevent a debtor from transferring his property, or getting in any debt due him, even if for the express purpose of defrauding

his creditors and defeating his claim in a threatened, or even pending, action.

The conditions in the North-West Territories are entirely different. A creditor here can attach any debts due or to accrue due to the defendant, if the debtor has attempted to sell or dispose of his personal property with intent to defraud his creditors generally, or the plaintiff in particular. He can attach the personal property to answer the judgment which he expects to recover. But a creditor is deprived of these remedies if the debtor conveys all his assets and book debts to a trustee, because a debt due to a trustee cannot be garnished or attached to answer the debt due by the *cestui que trust.*

Under these circumstances, the plaintiffs contend that they are deprived of their legal remedies, and apply to the Court of equity to prevent the defendant defrauding them of their claim.

If there is an instance where equity follows the law, I believe it should in this case. In ordinary conditions the law provides a clear legal remedy and gives explicit legal rights, I do not see why the Court, exercising its auxiliary jurisdiction, would not remove any impediments that stand in the way of the enforcement of legal process.

[Reference to *London Life Assurance Co.* v. *Wright,* 5 S. C. R. at pp. 507, 508; Kerr on Injunctions, p. 40.]

In ordinary circumstances there is no doubt that the plaintiffs would have had this legal remedy by attachment, but, owing to the intervention of trustees in this case, the plaintiffs were deprived of that legal remedy, and I do not see any reason why this Court could not grant equitable relief to remove the impediment in the way of legal process. I think this conclusion is fully borne out by the principles laid down in the above authorities.

While holding that this Court has jurisdiction to grant the equitable relief asked for, I am of opinion that this relief should not be granted except on material as complete and positive as that required for the issue of writs of attachment or garnishee. There is no doubt in my mind that in this case

the material was not sufficient. On this ground I come to the same conclusion as my brother Wetmore.

Appeal dismissed with costs.

[9TH DECEMBER, 1899.

GENGE v. WACHTER.

Attachment of debts—Purchase money of land—Deed of transfer—Acknowledgment of receipt—Estoppel—Pleading—Evidence—Waiver—Burden of proof.

This was an appeal by the judgment creditor, Colin Genge, from the judgment of SCOTT, J., in favour of the garnishee on the trial of an issue between the parties arising out of a garnishing application.

WETMORE, J.—The question raised by the issue is whether at the time of the service of the garnishee summons upon the defendant to this issue, Ignatz Wachter, the garnishee, there was any debt due or accruing due from him to his son Charles Wachter, the primary debtor.

The essential facts detailed in evidence are very short. Shortly before service of the garnishee summons, Ignatz purchased from Charles some lands owned by the latter. The price fixed for such purchase was, according to the best recollection of Ignatz, $250. A transfer of the property to Ignatz was executed under seal by Charles, in which the consideration was expressed to be $200, and the transfer acknowledged the receipt of such consideration by Charles. A certificate of title was under such transfer duly issued to Ignatz. The evidence discloses that no purchase money was actually paid by Ignatz to Charles, and the reason assigned for not paying it was that Charles owed Ignatz the money.

The debt sought to be attached is the purchase money in respect to the purchase of this property. Certainly, this alleged indebtedness from Charles to Ignatz strikes me as being of somewhat doubtful character. All the information vouchsafed is that Ignatz let Charles have a string team outfit, consisting of ten horses, three waggons and harness, and a saddle horse, to be used in his trading operations, that

Ignatz was to get half of the profits of such operations, and that Charles used this outfit for two years. Nothing whatever was paid to Ignatz on account of profits, no settlement was ever made with respect to such operations, and there is no evidence that Charles ever did make any profits out of them. Ignatz, the only witness called upon this question, swore that he had no idea what the profits were; that he had asked Charles several times for a statement, but he never got one; and that Charles never denied owing him.

The trial Judge found in favour of the defendant, upon the ground that the onus of proving the indebtedness of Ignatz to Charles was on the plaintiff, and that he failed to establish that the parties to the transaction ever intended thereby to create an indebtedness from Ignatz to Charles. I am not prepared under the circumstances of the case to state that I agree with the learned Judge, and I put my judgment upon another ground, and that is that there was no attachable debt due or accruing due from Ignatz to Charles.

In view of the acknowledgment under seal in the transfer from Charles to Ignatz, that the consideration or purchase money had been paid, Charles could not, in the absence of fraud, have maintained an action at law against Ignatz for such purchase money; he would be estopped by his deed: *Baker* v. *Dewey*, 1 B. & C. 704. This is also laid down by Sedgewick, J., in *Donohoe* v. *Hull*, 24 S. C. R. at p. 689. It may be urged that it was not necessary for the decision of *Donohoe* v. *Hull* to lay this down. Possibly not, but Mr. Justice Sedgewick's judgment was concurred in by the whole Court; in fact it was the judgment of the Court; and, to say the least, I should have very great hesitation in holding, directly in the teeth of a deliberately expressed and unanimous opinion of the highest Court in the land; and I may add (perhaps it may not be of importance) that I follow this holding all the more readily because it is in accord with my own opinion as to the law on the subject. It would seem however that the vendor would not be estopped by such an acknowledgment in his deed from proceeding in equity to recover the purchase money, if, as a matter of fact, it is unpaid: see 2 Dart on Vendors and Purchasers, 6th ed., p. 825;

but the remedy is *in rem* to sue in equity not upon his contractual rights but to assert a lien on the land sold by reason of the purchase money not having been paid and obtain a decree giving effect to that lien: *Donohoe* v. *Hull*, at p. 689. It is true that it appears to have been held in Ontario in *Sanderson* v. *Burdette*, 16 Gr. 119, 18 Gr. 419, and in *Shelly* v. *Shelly*, 18 Gr. 495, that the vendor is entitled to a decree for the sale of the land and that the deficiency, if any, be made good by the purchaser, but that personal liability of the purchaser is only contingent on there being a deficiency from the sale of the lands, and is incidental to the relief giving effect to the lien. Now, in garnishee proceedings there is no procedure by which any such decree or order can be obtained. The Court or Judge has no power in garnishee proceedings to give effect to the lien, and incidental to that to order the purchaser, the garnishee, to make good the deficiency on the sale. And it was just considerations of this character which influenced the Supreme Court in *Donohoe* v. *Hull* to hold that this Court could not in garnishee proceedings grant the relief asked for in that case. I am of opinion that the *ratio decidendi* in *Donohoe* v. *Hull* governs this case, and I call attention particularly to what is laid down in that case at p. 697.

It was urged on behalf of the plaintiff that the defendant could not in this case rely upon the estoppel, because estoppel must be specially pleaded, and, while it was conceded that there are no pleadings in a garnishee issue, it was urged that the defendant ought to have objected to the admissibility of the testimony offered to establish the non-payment of the purchase money, and that not having done so, he waived the estoppel. I am unable to take that view of it. I cannot conceive that the omission to object to the reception of the estimony puts the defendant in the position of contending that, notwithstanding the testimony, the plaintiff is not entitled to recover in the face of what the deed of Charles Wachter admits. And, moreover, having obtained the judgment of the trial Judge, the defendant has the right to support his judgment by any available ground, even though the trial Judge did not pronounce on it, and although the ground was

not taken before the trial Judge at all. I therefore think that the defendant has a right to come to this Court and say, practically, this debt is not an attachable debt due or accruing due from the garnishee to the primary debtor. I take it, by the question raised by the issue, whether this is such a debt due or accruing due, we must understand an attachable debt to be intended.

In my opinion this appeal should be dismissed with costs.

McGUIRE, J.—The garnishee positively denies owing his son anything at the date of the service of the summons. This witness was called by the judgment creditor, and was the only witness who testified as to the transaction between father and son respecting the sale of the land. As the learned trial Judge observes in his judgment, the burden of proof was on the judgment creditor to establish a debt owing by the garnishee to the judgment debtor. The transfer does not, help him, for it is admitted in it by the transferor that the consideration was paid, and this document was under seal. The creditor is forced to rely on the oral evidence of the garnishee, who, not only does not admit that he ever for a moment owed his son, but, on the contrary, says he did not owe him anything when served with the garnishee summons. Is not the plaintiff bound by the testimony of his own witness, supported as it is by the transfer, which was also put in by him? I am quite satisfied that it was never understood between father and son that the father should pay the son the $200 expressed as consideration, or any other sum. The reasonable conclusion to be drawn from the evidence is that the son agreed to give his father the land as payment on account of what he owed his father for the use of his horses or his share of the profits in the trading operations. I shall not discuss whether the father could, in the absence of any such agreement with his son, in an action by the son for the $200, have set off what was due him by the son in respect of the trading operations; but it was quite open to the son, on the sale of the land to his father, to agree that the price should go against such indebtedness to his father. Having regard to the fact that the transfer was made a few days after the son was sued by Genge, there may be room

for suspicion that the transfer was really voluntary and with a view to defeat any judgment Genge might recover in that action, but there is no evidence of that, and, even if there was, it would at most, in a proper case, result in setting aside the sale and so defeat the present claim that the garnishee was indebted to the judgment debtor for the price of the land.

I think the judgment of the learned trial Judge was the proper one, and that this appeal should be dismissed with costs.

Exchequer Court of Canada.

[BURBIDGE, J., 2ND MARCH, 1900.

DAVIES v. THE QUEEN.

Crown—Negligence—Agreement with municipality as to maintenance of highway—Accident from ice—Liability—Public work.

Under an agreement between the corporation of the city of Ottawa and the Dominion Government, the latter undertook, amongst other things, to maintain an approach to the Sappers' Bridge, such approach having been built by the city corporation, and forming part of a public highway. On the 23rd February, 1898, the sidewalk on the approach was in a slippery condition, and the suppliant in passing over it fell and sustained a fracture of one of her arms. She filed a petition of right seeking damages against the Crown under 50 & 51 V. c. 16, s. 16 (*c*).

Held, that, even assuming that the sidewalk upon which the suppliant fell was a public work, it not having been established that the duty to keep the sidewalk in repair, or in a safe condition for travel, had been imposed upon some officer or servant of the Crown who had been negligent while acting within the scope of such duty or employment, the case did not fall within the enactment, and the petition must be dismissed.

2. In this climate it is not possible in winter to have the sidewalks of the highways always in a safe condition to walk upon; and negligence in that respect when it is actionable consists in allowing them to remain an unreasonable time in an unsafe condition.

Fripp, for the suppliant.

Newcombe, Q.C., for the Crown.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS

[Moss, J.A., 30th March, 1900.

WINDSOR FAIR GROUNDS AND DRIVING PARK ASSOCIATION v. HIGHLAND PARK CLUB.

Parties—Third party notice—Agreement—Rule 209—Appearance—Leave to appeal.

Leave to appeal from an order of a Divisional Court, *ante* 98, setting aside a third party notice, was refused by a Judge of the Court of Appeal in Chambers.

Held, that the Divisional Court had not placed a construction of general application upon the words "or any other relief over" in Rule 209, but had merely decided their bearing upon the facts of this case, which were of a nature not likely to be of common occurrence; there was nothing special in the case beyond the fact that a Divisional Court of three Judges had differed from the view of another Judge of the High Court and of a local Judge; and the amount involved was comparatively small.

Moreover, the decision of the Divisional Court did not deprive the defendants of the benefit of the alleged dealings with the proposed third parties as a defence to the plaintiffs' action, and if the defence should be successful there would be no occasion for seeking relief over.

Semble, that even if leave to appeal were granted, it would not be on technical grounds, but only on the construction of the Rule.

F. A. Anglin, for the defendants.

Aylesworth, Q.C., for the proposed third parties.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACMAHON, J., 19TH APRIL, 1899.

FARMERS' L. & S. CO. v. SPROTT.

Limitation of actions—Recovery of land—Mortgage—Possession of widow of mortgagor—Payments—Agent—Novation—Extension of time.

In ejectment by a mortgagee against the widow of the mortgagor, it appeared that she had been in possession since his death in 1877, and had paid nothing on account of the mortgage since 1881. Payments had, however, been made upon a collateral mortgage over other lands, by a person who had purchased such lands from the mortgagee and the widow, up to 1897. But in 1887 this person made a new agreement with the mortgagee by which the time for payment of the balance then due was extended and the rate of interest reduced, without the knowledge or consent of the principal debtor.

Held, that the payments made by this person after the new bargain were not payments made by him as agent of the principal debtor, nor as one liable or entitled to pay off the mortgage debt secured by the principal mortgage, nor were they payments made on account of the principal debt.

Ejectment. The plaintiffs claimed as mortgagees under an instrument dated 9th October, 1877, made by James Sprott to them for $4,000 and interest at the rate of seven per cent. per annum, the land being in the township of Nottawasaga.

The defendant Esther Sprott, the widow of the mortgagor, set up the Real Property Limitations Act as a defence, and the other defendant, Alfred Sprott, alleged that he was not in possession and had been improperly joined.

The mortgage deed contained a recital that the mortgagor had bought the mortgaged lands from the mortgagees for $4,000, and had agreed to secure the purchase money by the mortgage, and also to collaterally secure $2,000 of the $4,000 on certain lands in the township of Osprey belonging to him; and following the proviso for redemption there was a provision that "the $2,000 payable on the 1st November, 1878, is to be collaterally secured by a mortgage on the Osprey lands, if that sum should remain unpaid when due."

No mortgage was ever executed by James Sprott to the plaintiffs on the Osprey lands, and he died intestate on the 19th November, 1897, leaving his widow, the defendant Esther, and several infant children, surviving him.

On the 31st January, 1881, the widow entered into an agreement with one Scutt to sell him the Osprey lands for $3,700, and an action was brought by the plaintiffs against her, and the children of the deceased in order to enable the sale to be made; and on the 3rd May, 1882, a judgment was pronounced in that action by which it was ordered and adjudged that the Osprey lands should be sold to Scutt for $3,700, $200 of which it was declared had been paid to the plaintiffs by Esther Sprott on the 2nd February, 1881, "and the balance of $3,500 to be payable as follows: $500 to the (plaintiffs) forthwith, less the costs hereinafter mentioned, the balance to be secured by a mortgage over the said lands in the township of Osprey to the said plaintiffs for $3,000, with interest at the rate of seven per cent. per annum, the said principal sum of $3,000 to become due and payable as follows: the sum of $250 at the end of each year during the first four years from the date of the said mortgage, and the remaining principal sum of $2,000 at the end of five years from the date of said mortgage, with interest yearly on the unpaid principal at the rate aforesaid."

The judgment further directed that the residue of the $500, after paying the costs, should be applied by the plaintiffs towards satisfaction of the principal sum of $4,000 and interest secured by their mortgage from James Sprott, and that the Scutt mortgage should be held by the plaintiffs as security collateral for the balance due on the Sprott mortgage, the time for the payment of the principal of which was extended until the time when the Scutt mortgage would become due and payable.

The judgment also declared that Scutt should be entitled, on payment of the $500 and execution of the mortgage for $3,000, to a vesting order for the Osprey lands, subject to his mortgage.

Scutt accordingly paid the $500, and on the 3rd May, 1882, executed a mortgage for $3,000 as directed. This

mortgage deed contained a recital that it was by the judgment provided that all payments made on it should be applied towards satisfaction of the Sprott mortgage, but this provision was not in the judgment.

Scutt paid the first four instalments which fell due on his mortgage as they became due, and in February, 1887, the time for payment of the balance, $2,000, was extended for five years from the 1st May following, the interest being reduced to six and a half per cent. per annum, and Scutt being required to pay $250 a year on account of the principal.

Scutt after the extension paid in each of the years from 1887 to 1892, inclusive, $250 on account of principal, with one year's interest at the reduced rate on the unpaid principal, and from 1893 to 1897, inclusive, made a payment on account of principal and interest each year, until the whole of the mortgage money was paid, the last payment having been made on the 3rd May, 1897.

The defendant Esther Scutt, the widow, having been in possession of the Nottawasaga lands ever since her husband's death, and no payment having been made by her on the Sprott mortgage since the $200 out of Scutt's purchase money paid on the 2nd February, 1881, this action was brought against her.

It was tried at Owen Sound before FALCONBRIDGE, J., who dismissed it with costs.

The plaintiff appealed, and his appeal was heard by a Divisional Court composed of MEREDITH, C.J., and MACMAHON, J., on the 6th February, 1899.

W. N. Miller, Q.C., for the plaintiffs.

Aylesworth, Q.C., and *G. W. Bruce*, for the defendant Esther Sprott

On the 19th April, 1899, the judgment of the Court was delivered by—

MEREDITH, C.J. —It is conceded that, unless the payments made by Scutt on his mortgage after the extension of time was given are to be treated as payments within the meaning of s. 22 of the Real Property Limitation Act, R. S. O. c. 133, the right of action of the plaintiffs is barred.

It was argued by Mr. Miller that an agreement to extend the time for payment of the Scutt mortgage money was not proved, but this contention is not, we think, well founded. The application for the extension was not proved at the trial, but from the letter of the plaintiffs, which was the answer to it, it is apparent that Scutt had made an application for the renewal of his loan, and contemplated that it might be necessary to give a new mortgage; the offer of the plaintiffs contained in their letter was definite in terms, and not the less so because the words "for say" precede the term of years for which the extension was offered to be made, and the evidence shows that that offer was accepted, and that the parties thereafter dealt on the footing of the new terms.

What might have been the result had the extension of the time of payment not been made, is, we think, unnecessary to consider, because the effect of the new bargain was to substitute for the then existing contract between the parties a new and different contract—different both as to the terms of payment and the rate of interest—and to make the mortgage debt the plaintiffs' own. The new contract was made without any knowledge or consent of the principal debtor, and it is apparent that the plaintiffs treated the transaction as in effect a new loan—and a new mortgage was not demanded, probably merely for the purpose of saving the expense of it, and so securing to the plaintiffs the investment for the extended period.

Whether the rule to be applied for determining whether the payments made by Scutt operated to prevent the statute running in favour of the principal mortgagor, be that adopted by the English Court of Appeal in *Newbould* v. *Smith* (1886), 33 Ch. D. 127, or that taken by the Privy Council in *Lewin* v. *Wilson* (1886), 11 App. Cas. 639, or by the Irish Court in *Honan* v. *Andrews* (1850), 1 Ir. Ch. N. S. 106, *Cronin* v. *Denahy* (1863), 3 Ir. R. C. L. 289, *Scott* v. *Synge* (1891), 27 L. R. Ir. Ch. 560, and *In re Conlan's Estate* (1892), 29 L. R. Ir. 199, the payments made by Scutt after the new bargain cannot, we think, be deemed to be payments made either by Scutt as an agent of the principal mortgagor, or by him as

one who was liable or entitled to pay the mortgage debt secured by the principal mortgage, or as payments made on account of the principal debt.

The judgment appealed from must, therefore, be affirmed, and the appeal dismissed with costs.

[12TH FEBRUARY, 1900.

MORSON v. BURNSIDE.

Principal and agent—Commission of land agent.

The defendant, knowing that the plaintiff was a land agent, arranged with the plaintiff to procure for him a purchaser for a lot of land of his at a named price. Through the plaintiff's intervention a proposed purchaser was procured, and a purchase discussed; the result, however, was that a lease was entered into of the premises for three years, with a collateral agreement giving him the option of purchasing within a year, which he exercised, and purchased the property.

Held, that the plaintiff was entitled to his commission.

H. M. Mowat, for the plaintiff.

R. J. Gibson, for the defendant.

[2ND APRIL, 1900.

YOUNG v. DOMINION CONSTRUCTION CO.

Writ of summons—Substituted service—Foreign corporation—Rules 146, 167—Waiver—Appearance.

Service of process must be, if possible, personal, or, in the case of a corporation, upon the duly constituted agent; the substitutional method is to be followed only when prompt personal service appears by affidavit to be unavailable.

Rule 146 regulates substituted service of process. Rule 167 covers miscellaneous proceedings in the progress of litigation, but is not to be used so as to nullify the special Rule applicable to writs of summons.

And where the plaintiff shewed that he knew where the head office of the defendants, a foreign corporation, was, and that they had no office or definite place of business within Ontario, and there was nothing to shew that they could not be easily served at the head office, an order for substituted service was vacated.

Order of BOYD, C., in Chambers, affirmed.

The Court declined to consider the question whether the defendants had waived proper service by entering a conditional appearance, there having been no evidence before the Chancellor that an appearance had been entered, and he having refused to consider it.

A. M. Lewis, for the plaintiff.

D'Arcy Tate, for the defendants.

[MEREDITH, C.J., ROSE, J., 15TH JANUARY, 1900.

REGINA v. McGARRY.

Liquor License Act—Prior conviction—Proof of.

Under s.-ss. 1 and 2 of s. 101 of the Liquor License Act, R. S. O. c. 245, it is not necessary that the proof of the prior conviction should be by the production of the formal conviction or by a certificate thereof, other satisfactory evidence being by the statute declared to be sufficient.

Where, therefore, on a trial before a magistrate—being the same magistrate by whom the defendant had been previously convicted of a like offence—the information alleging such prior conviction, all that appeared with regard to it was the evidence of the license inspector, who proved that the defendant was the person previously convicted:—

Held, that it must be assumed that the magistrate satisfied himself as to the prior conviction, the inspector's evidence only being necessary to prove the identity of the defendant.

J. M. Godfrey, for the defendant.

Langton, Q.C., for the prosecutor.

[8TH FEBRUARY, 1900.

WHITELOCK v. COOK.

Landlord and tenant—Removal of goods before rent due—Illegal distress—Pretended sale by tenant—Right of tenant to set up title to goods—Counterclaim—New trial.

A landlord is not justified in distraining goods which had been removed off the demised premises before the rent accrued due, though had the rent been due the removal would have been fraudulent; and the tenant is not precluded from setting up his title to the goods because of a pretended sale of them, the effect of which was to vest the possession, but not the property in the goods, in the alleged purchaser.

To an action for illegal distress brought in a County Court the defendant counterclaimed for rent due, but such counterclaim not having been tried, the action was remitted back to the County Court, to be there dealt with, and regard there to be had to the finding of this Court upon the rights of the parties.

J. Bicknell, for the plaintiff.

D. E. Thomson, Q.C., for the defendant.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 28TH DECEMBER, 1899.

NORTHEY MFG. CO. v. SAUNDERS.

Sale of goods—Specific article—Warranty—Parol evidence.

A written contract was entered into for the sale by description of a specific article, namely, a gasoline engine with a pump standard. It was not pretended that the article did not answer the description.

Held, that the contract must be taken to cover, as it purported to do, the whole contract between the parties, and parol evidence was not admissible to show a warranty made prior to the entering into of the contract which was inconsistent with the written warranty, as it would be allowing the admission of parol evidence to control, vary, add to, or

subtract from, the written contract; and the statements alleged to have been made by the vendors, and acted on by the purchaser, were not such as to constitute a separate and independent collateral agreement, and admissible as such.

Judgment of County Court of York affirmed.

J. R. Roaf, for the plaintiffs.

A. Mills, for the defendant.

[29TH DECEMBER 1899.

REGINA *ex rel.* HORAN v. EVANS.

Public schools—Trustee—Right to office—Residence—Quo warranto—Discretion—Costs—R. S. O. c. 292, s. 14, s.-s. 8.

The defendant, a life tenant of a farm in the township of Albion, lived on it from 1888 until 1894, when he rented it to his son, and went to live with his wife and family on a farm owned by his wife in the township of Caledon, where he continued to live until 1898, when the son having given up possession of the Albion farm, he took possession of it, to enable him to work it, sleeping in the house, and occasionally visiting his wife and family and remaining there over night, while the wife occasionally visited him, staying a couple of weeks, when there was cooking or mending to be done.

Held, that the defendant's place of residence was where his wife and family lived, and he was therefore not a resident within the township of Albion, so as to qualify him as a trustee for a school section within that township, to which office he had been elected. As, however, the granting of the order for a *quo warranto* was in the discretion of the Court, and the term of the defendant's office would expire before the issue could be tried, the motion was dismissed, but without costs.

The relator was not debarred by R. S. O. c. 292, s. 14, s.-s. 8, from making the application.

T. J. Blain, for the relator.

W. S. Morphy, for the defendant.

[10TH JANUARY, 1900.

ROYAL VICTORIA LIFE INS. CO. v. RICHARDS.

Life insurance—Premium payable on presentation of policy—Non-acceptance of policy—Damages.

By an application for a policy of insurance on the defendant's life he bound himself to pay the first premium on the presentation of the policy; but it was also agreed that the company should not incur any liability until the premium had been actually paid and received by the company. The application was accepted by the company and a policy issued and tendered to the applicant, who refused to accept the same.

Held, that the company could not claim the whole amount of the premium as liquidated damages, but were entitled to such damages only as had been occasioned by the defendant's refusal to accept the policy.

Riddell, Q.C., for the plaintiffs.

No one for the defendant.

[22ND JANUARY, 1900.

MEEK v. PARSONS.

Crown—Free grant and homestead lands—Indirect alienation—Restraint on—Crown grantee—Mistake of title—Violation of statute—R. S. O. c. 29, s. 19.

Section 19 of the Free Grant and Homesteads Act, R. S. O. c. 29, which provides that "neither the locatee, nor any one claiming under him, shall have power to alienate (otherwise than by devise), or to mortgage or pledge any land located as aforesaid, or any right or interest therein before the issue of the patent," does not prevent an agreement being entered into before the issue of a patent for the grant of land after the issue thereof, and, where such agreement was entered into, it was enforced after the issue of the patent, and where all the requisites of s. 8 of the Act had been complied with; FALCONBRIDGE, J., dissenting.

Judgment of MACMAHON, J., 31 O. R. 54, 19 Occ. N. 318, reversed.

Aylesworth, Q.C., for the plaintiff.

D. E. Thomson, Q.C., for the defendant.

[30TH JANUARY, 1900.

MACGREGOR-GOURLAY CO. v. SULLY.

Apprentice—Articles of apprenticeship — Unreasonable provision — Non-liability.

Held, that a provision in articles of apprenticeship which required the apprentice, during the term of four years of 310 working days, to give and devote to a firm, to whom he was apprenticed, ten hours each working day, or such number of hours as might be fixed by the regulation of the workshop for the time being, or as special exigencies of the business might require, was unreasonable, and could not be enforced against the infant; and therefore an action was not maintainable against the defendant, who was security under the articles for the performance of the infant's duties, to recover damages for the breach thereof.

Regina v. *Lord*, 12 Q. B. 757, followed.

Shepley, Q.C., for the plaintiffs.

Riddell, Q.C., for the defendant.

[31ST JANUARY, 1900.

GARDNER v. CANADIAN MANUFACTURER PUBLISHING CO.

Company—Directors—Invalid resolution—Payment of creditors.

By the by-laws of a publishing company the board of directors was to consist of three persons, two of whom constituted a quorum. At a meeting, at which two of the directors, C. and G., were present, one being the president and the other the secretary of the company, a resolution was passed that "the matter of the compensation of C., the editor, and

G., the advertising solicitor of the company, was considered, and the sum of $1,000 each ordered to be placed to their respective credits in the books of the company for services rendered during the year 1895, in addition to their regular salary, and to be charged to their salary account." C. as a matter of fact had not been appointed editor, nor G. advertising solicitor, the object of the resolution being to appropriate all the funds of the company, and to prevent a stockholder, who owned the greater part of the stock, and had made a claim against the company, being paid.

Held, that the resolution could not be sustained, nor could any moneys received under it be retained.

Shepley, Q.C., for the plaintiff.

Walter Barwick, Q.C., for the defendants.

[2ND FEBRUARY, 1900.

REGINA v. TORONTO PUBLIC SCHOOL BOARD.

Sessions—Appeal from dismissal of complaint—Offence under by-law—R. S. O. c. 223, s. 551.

There is no appeal to the Court of General Sessions of the Peace from an order of dismissal of a complaint made against the defendants for an offence against a city by-law passed under the authority of s. 551 of the Municipal Act, R. S. O. c. 223.

F. E. Hodgins, for the defendants.

J. E. Jones, for the prosecutor.

[MEREDITH, C.J., FALCONBRIDGE, J., 4TH APRIL, 1900.

TANNER v. WEILAND.

Security for costs—Appeal to Divisional Court—Rule 825.

Rule 825, providing that no security for costs shall be required on a motion or appeal to a Divisional Court, does not preclude a defendant from obtaining an order for security

for costs where the plaintiff has taken up his residence abroad after a judgment dismissing his action without costs, from which his appeal to a Divisional Court is pending.

Arnold v. *Van Tuyl*, 30 O. R. 663, distinguished.

Grayson Smith, for the plaintiff.

Haverson, for the defendant Christina W. Weiland.

[BOYD, C., ROBERTSON, J., MEREDITH, J., 6TH APRIL, 1900.

REGINA v. KEMPEL.

Criminal law — Extortion — Accusation — Information — Criminal Code, ss. 405, 558.

The word "accuses" in s. 405 of the Criminal Code, providing for the punishment of any one who, with intent to extort or gain anything from any person, *accuses* that person or any other person of certain offences, includes the accusing of a person by laying an information under s. 558 of the Code.

J. R. Cartwright, Q.C., for the Crown.

David Robertson, for the prisoner.

[BOYD, C., 28TH DECEMBER, 1899.

BOARDMAN v. NORTH WATERLOO FARMERS' MUTUAL FIRE INS. CO.

Fire insurance—Condition—Change material to risk—Non-occupancy.

Where by a condition in a fire policy on a dwelling house, any change material to the risk, etc., should avoid the policy, the fact of the premises being unoccupied and vacant does not constitute a breach of such condition.

Mabee, Q.C., for the plaintiff.

Johnston, Q.C., and *W. M. Reade*, for the defendants.

SPAHR v. NORTH WATERLOO FARMERS' MUTUAL FIRE INS. CO.

Fire insurance—Statutory conditions—Condition requiring occupation of premises—"Untenanted," meaning of.

A condition in a policy of fire insurance that "if the premises insured become untenanted or vacant, and so remain for more than ten days without notifying the company," etc., "the policy will be void," is a reasonable condition, and the word "untenanted" therein must be read as synonymous with "unoccupied."

Where therefore, the occupant of a house left it for several weeks, but left the furniture and clothing therein, while a person went there to feed the pigs and chickens and water the flowers, and on two occasions the insured's husband slept in the house, it was held that the house was untenanted and vacant within the meaning of the condition.

Mabee, Q.C., for the plaintiff.

Johnston, Q.C., and *W. M. Reade*, for the defendants.

[31st March, 1900.

JACKSON v. GARDINER.

Judgment—Default of defence—Ex parte application—Defence filed after default note—Motion to set aside judgment—Costs—Rules 263, 358, 586.

A statement of defence filed after the pleadings have been noted as closed for default of defence under Rule 263, is irregular, but not a nullity, and should be regarded as evidence of an intention to defend; and where, as now permitted by Rule 586, a motion for judgment upon the statement of claim is made *ex parte*, and the fact of the defence having been filed is brought to the knowledge of the Judge, he should direct notice to be served in order to give the defendant an opportunity to make his defence regular.

In this case judgment having been granted *ex parte*, it was ordered that there should be no costs of the defendant's motion for relief under Rule 358, which was granted.

E. Taylour English, for the defendant.

J. H. Moss, for the plaintiff

[MEREDITH, C.J., 6TH JANUARY, 1900.

McCORMICK v. COCKBURN.

Mortgage—Fraud of solicitor—Liability.

The plaintiff, for the purpose of raising a portion of the purchase money on a contemplated purchase of land, mortgaged lands then owned by him to the defendant C., the money being received by a solicitor who acted for both parties. The purchase not having been carried out, the plaintiff asked to have the mortgage discharged, whereupon the solicitor, who had misappropriated the moneys, fraudulently procured from the mortgagee an assignment of the mortgage to himself, which he assigned to the defendant P., who advanced the money thereon in good faith and without any knowlege of the fraud.

Held, that the plaintiff was entitled to a reconveyance of the property released from the mortgage, and that the loss must be sustained by the defendant P., who took nothing under the assignment to him, for the mortgage being paid off, the solicitor acquired no beneficial interest, being at most but a trustee of the legal estate, and he could pass no higher or better title to his assignee.

Lynch-Staunton, Q.C., for the plaintiff.

W. H. Blake, for the defendant Cockburn.

Crerar, Q.C., for the defendant Penman.

[FERGUSON, J., 29TH DECEMBER, 1899.

HAMILTON v. NORTHEY MFG. CO.

Sale of goods—Engine—Warranty—Remedy—Return of article.

Where in a contract for the sale of a gasoline engine and tank there was a warranty that if the engine would not work well, notice thereof was to be given to the defendants, stating wherein it failed, and giving a reasonable time to get to it and remedy the defect, and, if such defect could not be remedied, the engine was to be returned to the defendants and a new engine given in its place:—

Held, that the plaintiff's remedy under such warranty was for the return of the engine and its replacement by another engine, and not for damages for breach of warranty.

Henchcliffe v. *Banrick*, 5 Ex. D. 177, followed.

A. S. Ball and *S. G. McKay*, for the plaintiff.

J. R. Roaf, for the defendants.

[ROSE, J., 11TH JANUARY, 1900.

POTTS v. POTTS.

Life insurance—Benefit society—Beneficiary for value—Right in policy.

Under ss. 151 and 160 of the Ontario Insurance Act, R. S. O. c. 203, it is not necessary, in the absence of a requirement therefor on the face of the policy, to find as a fact whether or not the beneficiary is one for value; but, apart from this, the evidence in this case showed that the plaintiff, who claimed to be a beneficiary under such a policy, had no claim whatever thereunder.

Waldron and *Mulvey*, for the plaintiff.

Teetzel, Q.C., and *McClemont*, for the defendant.

[STREET, J., 16TH MARCH, 1900.

In re OTTAWA PORCELAIN AND CARBON CO.

Company—Winding-up—Municipal taxes and water rates—Right of city corporation to rank on estate—Distress—Personal liability.

The company owned its business premises in the city of Ottawa, subject to a mortgage to J. R. Allen, who commenced an action for foreclosure. Upon a winding-up order being made, Allen filed his claim, and the liquidators, under s. 62 of the Winding-up Act, with the approval of the Court, consented to his taking the property, and also consented to judgment for immediate foreclosure in the action.

Subsequently the city corporation filed with the liquidators a claim of $641 for arrears of taxes, and $902 for arrears of water rates.

Held, as to the taxes, that the only remedy which the city corporation had was to apply to the Court under s. 16 of the Act for leave to distrain. Upon such an application the Court would have determined whether the circumstances were such as to induce it to grant such leave: *In re Oak Pits Colliery Co.*, 21 Ch. D. 322.

If the distress in this case had been levied before the beginning of the winding-up, then, as in *In re Army and Navy Clothing Co.*, decided by BOYD, C., 11th January, 1898, the Court would, there being no right of action for the taxes, have preserved to the company the right of distress, on the principle that where there is not a right of action, and therefore no privity between the parties, the distrainor may pursue his only remedy (distress) as if no liquidation existed; but where a right of action exists, even though there is also a right to distrain, then the creditor is within the Act, and must prove as an ordinary creditor.

The provisions of the final clause of s.-s. 1 of s. 135 of the Assessment Act with regard to goods in the hands of a liquidator apply only to proceedings under the Joint Stock Companies Winding-up Act.

By 35 V. c. 80, s. 11, power is given to fix rates which an owner shall pay, and such rates, if unpaid, are to be a lien or charge upon the real estate, but by s. 13 a personal liability to pay the rates is created against the owner. The city corporation, by by-law passed in 1890, fixed the insolvent company's water rates, and had assessed it by name from year to year since.

Held, that a liability to pay was thereby imposed, and this liability is a sufficient foundation for a valid claim by the corporation to rank on the estate in the hands of the liquidator for the amount of the water rates. The corporation are not bound to prove as secured creditors, notwithstanding their lien upon the property arising under s. 11, because the lien is upon property in which the insolvent company is not interested, having already surrendered it to a prior mortgagee, and the liquidator could not give it up to the claimant as required by s. 62 of the Winding-up Act: *Ex p. West Riding Union Banking Co.*, 19 Ch. D. pp. 105, 112.

Shepley, Q.C., for the city corporation.

C. J. R. Bethune, for the liquidator.

MANITOBA.

In the Queen's Bench.

[DUBUC, J., 21ST MARCH, 1900.

NORTH OF SCOTLAND CANADIAN MORTGAGE CO. v. THOMPSON.

Real Property Act—Objections to caveat—Addition or description of caveator—Seal of corporation.

Application under the Real Property Act. An objection was taken to the caveat that it contained no addition or description of the caveator. The caveator was referred to in the caveat by its name only, and was stated to be "The North of Scotland Canadian Mortgage Company, Limited," with no other addition or description; and the office of the solicitors, with a statement as to where it was situated, was appointed as the place at which notices of proceedings relating thereto might be served.

Held, that the objection should be overruled. No addition could be given except that it was an incorporated company. The name of such a company sufficiently implies that it is a corporation: *Shears* v. *Jacob,* L. R. 1 C. P. 513.

It was also objected that the execution of the caveat was defective. It was signed: "The North of Scotland Canadian Mortgage Company, Limited," and underneath "Osler, Hammond, and Nanton, Managers." It was contended that the corporate seal of the company should have been affixed to the document, so that the company would be bound.

Held, sufficient. A caveat is only a notice to the registrar; an initiatory proceeding to allow the caveator to bring the matter before the Court, and, although the form and mode of execution prescribed by statute have to be observed, it cannot be considered as a deed, or such a solemn document as to require the seal of the corporation.

Objections overruled; costs to be costs in the cause to the petitioners in any event.

Munson, Q.C., for the caveators.

Stacpoole, for the caveatee.

[BAIN, J., 2ND APRIL, 1900.

BREWSTER v. BREWSTER.

Husband and wife—Interim alimony—Deed of separation—Subsequent reconciliation, followed by desertion.

Action for alimony. Motion by the plaintiff for an order for interim alimony and cash disbursements, under Rule 936.

The parties were married on the 20th December, 1898. On the 20th May, 1899, the defendant deserted the plaintiff until the 25th June following, when he returned to her, but immediately after deserted her again and left her without any means of support. The defendant opposed the motion, and relied on the fact that when he and the plaintiff separated in May, 1899, they joined in a deed of separation by which the defendant was to pay the plaintiff $100 on the 1st November, 1899, which the plaintiff agreed to accept and take in full satisfaction for her support and all alimony whatsoever during her coverture.

Held, that the plaintiff was entitled to interim alimony, which, under the circumstances, should be $3 a week, with $20 for cash disbursements.

Whether the deed, if the parties had continued to live apart after it was executed, would disentitle the plaintiff to the order for interim alimony, was a question that would require consideration: *Williams* v. *Baily*, L. R. 2 Eq. 729; *Atwood* v. *Atwood*, 16 P. R. 60; but the effect of the reconciliation was to put an end to the deed: *Bateman* v. *Ross*, 1 Dow 235; *St. John* v. *St. John*, 11 Ves. 537.

F. S. Andrews, for the plaintiff.

Hartley, for the defendant.

In re ST. BONIFACE PROVINCIAL ELECTION PETITION.

Parliamentary elections—Petition—Security for costs—"Current money of Canada."

Application to consider preliminary objections. One objection taken was that the security for costs required by the statute had not been furnished. The prothonotary stated that at the time of the presentation of the petition, the solicitor for the petitioner paid him $750 in Dominion notes, and that he deposited these notes in the Imperial Bank. One of the notes was for $500, another for $100, the numbers of both of which he kept, and the remaining sum was made up of one dollar notes. The clerk of the Imperial Bank was subpœnaed and produced the note for $500; search had been made for the others, but they could not be found, and he believed they had been paid out in the ordinary course of business.

The prothonotary identified the $500 note produced, and the petitioners were held entitled to give secondary evidence of the missing notes.

Evidence was given that all the notes in question had been paid to the petitioners' solicitor by the Banque d'Hochelaga as Dominion notes, and that he had deposited them with the prothonotary when he filed the petition as the security for costs required by the statute.

What the Controverted Elections Act requires is that the deposit for security for costs shall be current money of Canada.

Held, that it had been *prima facie* proved that the deposit that was made answered the description required by the statute. The notes purported to be Dominion notes, and that they were current as such was amply shown by the fact that they had been paid out over the counter of one bank and were received in a deposit by another bank in the ordinary course of business, as genuine notes. There could be no possible doubt but that the security required had been given, and that it was available for the payment of the respondent's costs.

Objection overruled with costs to the petitioners in any event.

Andrews and *Bernier*, for the petitioners.

Wilson, for the respondents.

BRITISH COLUMBIA

In the Supreme Court

[IRVING, J., 8RD MARCH, 1900.

TILLEY v. CONFEDERATION LIFE ASSOCIATION.

Life insurance—Premium note—Non-payment—Forfeiture—Extended insurance.

A life policy was issued on the 27th June, 1894, for $5,000, an annual premium of $84.50 being payable on the 20th March in each year. The second premium was paid on the 20th March, 1895, but the third was not paid, the insured giving a promissory note dated 20th March, 1896, at ninety days, the note providing that if it was not paid at maturity the policy should become null and void, but subject, on subsequent payment, to reinstatement under the rules for lapsed policies. Payments on account of the note were made, and in February, 1898, the insured died.

Held, in an action by the beneficiary, that the giving of the note was not a payment of the premium such as would entitle the insured to the extended insurance allowed in case three full annual premiums had been paid.

Wilson, Q.C., and *Bloomfield*, for the plaintiff.

McPhillips, Q.C., for the defendants.

NORTH-WEST TERRITORIES

In the Supreme Court.

[THE JUSTICES IN BANCO, 9TH DECEMBER, 1899.

REGINA v. CADDEN.

Criminal law—False pretences—Bailiff—Execution—Excessive amount—Fraudulent intent—Demand by third person—Receipt by bailiff.

Crown case reserved by WETMORE, J.

Three questions of law were submitted, to wit:—

1. Was the false statement made by one O'Keefe to Mapleton upon which the conviction was made, under the circumstances, a false pretence within the meaning of s. 358 of the Criminal Code, 1892?

2. If it was, was the accused Cadden liable to conviction, inasmuch as he did not himself actually make such false statement to Mapleton?

3. Was the finding that Cadden was a party to the making of such false statement to Mapleton, and that it was made with a fraudulent intent on his part, justified in law.

The facts were as follows:—

One David J. O'Keefe brought an action and obtained judgment by default against Dorothy Mapleton for $37.45. An execution was issued on this judgment against the defendant, and was delivered the same day by the plaintiff to Cadden, the accused, who was the bailiff of the deputy sheriff

at Yorkton, but had no authority to execute a writ of execution unless a warrant was issued to him signed by the deputy sheriff to do so. The execution in question never passed through the sheriff's office or came to his knowledge, and no warrant was ever issued to Cadden.

While the evidence was not very clear on the point, the trial Judge inclined to believe that the execution was indorsed to levy, in addition to the face of the judgment ($37.45) and poundage and incidental expenses, 50 cents for clerk's fee on judgment and 50 cents for clerk's fee on execution; at any rate the Judge gave the accused the benefit of finding that it was so indorsed.

On the evening of the 25th January the accused met Dorothy Mapleton in Saltcoats, produced the execution in question, and threatened to go out to her place, about 30 miles distant from Saltcoats, the following day, and seize under it. She informed him that she had sent the money by post office order to Mr. Dunlop, the deputy clerk at Yorkton, and warned him that if he went out to her ranche and seized, he would do so at his peril. Cadden persisted in his threat to go out and make the seizure. As a matter of fact, Dorothy Mapleton had forwarded to Dunlop $36.80, which was the amount of the claim and costs as appeared by the memorandum on the writ of summons served on her, and this amount was received by the deputy clerk on the 25th January.

In consequence of Cadden persisting in his threat to go out and seize, Dorothy Mapleton went to the residence of O'Keefe the same evening, in order to induce him to prevent the accused going out to seize; she then informed O'Keefe that she had sent the $36.80 to Dunlop. O'Keefe apparently was satisfied that she had remitted the money, and recognized it as a payment properly made on account of the judgment. He refused, however, to withdraw the execution, alleging that there were more expenses attached to it, and that there were more costs to pay, and he stated that such costs would probably be about $15. Dorothy Mapleton then requested O'Keefe, who lived a short distance out of Salt-

coats, to come to the village with her and ascertain what these costs were, saying that she would pay them under protest. O'Keefe accordingly accompanied her to the village; she went to her boarding house, and O'Keefe went in search of Cadden.

Shortly after this and the same evening O'Keefe and Cadden appeared at this boarding house and saw Dorothy Mapleton, and O'Keefe, in the presence and hearing of Cadden, told her that she had $14.95 more to pay, and Dorothy Mapleton paid this amount to O'Keefe in the presence of Cadden. Cadden and O'Keefe then left the boarding house, and O'Keefe paid to Cadden $10, a portion of the money so received from Dorothy Mapleton.

At the time of this representation and payment, the claim under the judgment and execution against her was, after deducting the $35.80 paid and adding the clerk's fees for signing judgment and issuing execution, only $1.65.

The amount therefore exacted from Mapleton was $13.30 more than she was liable to pay.

O'Keefe knew when he represented that there was $14.95 to pay, that Cadden had not made any seizure under the execution, and he and Cadden both knew that no fees or costs were payable under the execution for sheriff's fees, and that the only amount really payable by Dorothy Mapleton was the difference between the amount paid by her to Dunlop, the deputy clerk, and the amount of the judgment with the clerk's fees for signing judgment and issuing execution added. O'Keefe's statement, therefore, to Mapleton that she had $14.95 more costs to pay was absolutely false. The Judge found also that it was known to both O'Keefe and Cadden to be false, and that it was made with the fraudulent intent on the part of both O'Keefe and Cadden to induce Dorothy Mapleton to act upon it.

There was no evidence whatever that the accused himself made this false statement to Mapleton.

In fact, the evidence shewed that it was made by O'Keefe, and not by him, and there was no *direct testimony* to satisfy the

Judge that the accused instigated O'Keefe to make the false statement. O'Keefe swore that the whole $14.95 which he stated to Mapleton was payable was made up of sheriff's fees which the accused represented were payable, and that the accused gave him, O'Keefe, a statement in writing showing how the amount was made up, which statement he had lost. The Judge said that he did not believe O'Keefe as to this. In fact, there was no evidence produced which satisfied him as to what took place between O'Keefe and Cadden between the time that Mapleton and O'Keefe separated in Saltcoats village and the time that O'Keefe and Cadden appeared at Mapleton's boarding house. The Judge inferred that Cadden was a party to the false pretence and to the fraudulent intent, from the facts that he appeared at the boarding house with O'Keefe; that he heard the false statement made; that he knew it was false; that he saw Mapleton pay the money and O'Keefe receive it; and that he received part of what was paid from O'Keefe.

The judgment of the Court was delivered by

ROULEAU, J.—What is a false pretence? A false pretence is a representation, either by words or otherwise, of a matter of fact, either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation: s. 358, Criminal Code, 1892.

According to the facts of this case, there cannot be any doubt that a false representation was made by O'Keefe to Mapleton as to the amount of money still due, and that he made that representation for the purpose of obtaining fraudulently a sum of money which he knew was not due to him, and by means of said false representation induced Dorothy Mapleton to pay the said sum of money.

In *Rex* v. *Woolley*, 1 Den. C. C. 539, is was decided that the secretary of an Oddfellows' lodge, whose duty it was to receive money for the members at lodge hours, but not at other times, was guilty of a false pretence because he falsely represented to one member that he owed a sum of 13s. 9d., which he made him pay, while he owed only 5s. Alderson,

B., said: "If a man represents as an existing fact that which is not an existing fact and so gets your money, that is a false pretence." Lord Campbell remarked: "It seems that the Legislature meant to prevent such gross frauds as may easily be perpetrated, though an inquiry might easily be made."

Therefore I have no doubt that the first question should be answered in the affirmative.

But it was contended that if O'Keefe was guilty of that offence, Cadden, the accused, could not be convicted, because it is in evidence that he never made any false representation to Mapleton.

Although there is no evidence that he made any false representation himself, still it was found by the learned trial Judge that he was present when the false statement was made; that he knew it to be false; and that he got part of the money so fraudulently obtained. In *Rex* v. *Young*, 3 T. R. 96, where several persons were indicted for obtaining money under false pretences, it was objected that, although they were all present when the representation was made to the prosecutor, yet the words could not be spoken by all, and one of them could not be affected by words spoken by another, but that each was answerable for himself only, the pretence, conveyed by words being, like the crime of perjury, a separate act in the person using them. The Court of King's Bench, however, held that, as the defendants were all present, acting a different part in the same transaction, they were guilty of the imposition jointly.

It has been laid down as a principal in *Regina* v. *Kerrigan*, 33 L. J. M. C. 71, that on an indictment for obtaining money under false pretences a person who has concurred and assisted in the fraud may be convicted as principal, though not present at the time of making the pretence and obtaining the money. These authorities are very much in point.

We think that the accused, Cadden, was liable to conviction, and the learned trial Judge was justified in law in finding that Cadden was a party to the making of such false

statement to Mapleton, and that it was made with a fraudulent intent on his part. The two last questions are therefore also answered in the affirmative.

In re LILLIS.

Land Titles Act—Description of land—Exceptions—Uncertainty—Refusal of application.

An application on behalf of Michael Lillis to bring the south half and the north-west quarter of section 26, in township 16, range 5, west of the second principal meridian, except lots 17 to 21 inclusive, of Dennis and Sons and Company's survey, under the operation of the Land Titles Act.

The Registrar of the Assiniboia Land Registration District referred the application to WETMORE, J., who, under s. 140 of the Land Titles Act, referred it to the Court in banc.

The judgment of the Court was delivered by

McGUIRE, J.—The difficulty which stands in the way of allowing the application arises in this way:—

In 1882 the Hudsons Bay Company by deed conveyed to one Piggott the whole of said half and quarter section. In 1897 Piggott by quit claim conveyed to one Bowen the said land "saving and reserving nevertheless thereout and therefrom any lots or blocks that may heretofore have been deeded to others." A few days later Bowen by quit claim conveyed to the present applicant, Michael Lillis, describing the property in all respects and with the same measurements, exceptions, and restrictions as in the deed from Piggott to Bowen.

The effect of these two instruments would be to pass to Lillis the title of Piggott to said half and quarter section, excepting any lots or blocks that had been deeded to others prior to the deed from Piggott to Bowen, and excepting also any lots or blocks which had been deeded to others prior to the deed from Bowen to Lillis.

The applicant concedes that lots 17 to 21, both inclusive, had been so deeded to others, and were therefore excepted, and he makes no claim to these. But there was nothing before Mr. Justice Wetmore, nor is there anything before this Court, to show that Piggott or Bowen may not have deeded other lots or blocks to others prior to the date of the quit claim deeds given by them respectively; and if it should turn out that they had done so, then such lots or blocks would not have passed by said instruments, since they purport to convey only so much of said land as had not been so deeded to others.

A notice of the application and of the time and place it would be heard by Mr. Justice Wetmore was directed to be published in five issues of the "Grenfell Sun," and to be posted up in six places in Broadview, in order that persons having interests adverse to the applicant might come in and oppose the application. No adverse claimant appeared. Now, the fact that no one appeared, in pursuance of notice, to oppose the application, does not by any means prove that no lots or blocks other than those admitted by the applicant had been deeded to others prior to the dates of the respective quit claim deeds. The instruments themselves afford no means of ascertaining what lots or blocks were excepted from said instruments, and there was no evidence offered to show how many or what lots or blocks had been so deeded.

It is possible that evidence may exist somewhere to show what these lots or blocks may be, but until that evidence is forthcoming it is impossible to say what land the applicant became entitled to; that is to say, the description is left so vague and indefinite that unless it can be supplemented by extrinsic evidence the quit claims on which the applicant relies would be void for uncertainty.

This is a rudimentary proposition of law, and an instance of its application may be found by reference to *Pearson* v. *Mulholland*, 17 O. R. 502, where a tax sale deed purporting to convey to the purchasers "forty-five acres of the south half of lot 17," etc., without any words to indicate what particular forty-five acres were intended, was declared to be void for uncertainty.

In the present case it is obvious that, owing to the uncertainty as to what lots or blocks are excepted, it is impossible to say of any single lot that it is part of what was intended to be conveyed to Lillis.

It therefore follows that, upon the evidence at present before the Court, the title of the applicant is so uncertain that the Registrar should be, and he is hereby, directed to refuse the application.

REGINA v. PACHAL.

Criminal law—Procedure—Stealing cattle—Right to jury.

Crown case reserved.

The defendant was charged before WETMORE, J., with having stolen one steer, the value of which did not, in his opinion, exceed $200, and was convicted.

It was conceded at the trial that the charge was one of stealing "cattle," as defined by s. 3 (*d*) of the Criminal Code.

The accused by his counsel claimed, under the provisions of s. 67 of the North-West Territories Act, as amended by 54 & 55 V. c. 22, s. 9, the right to be tried by a Judge with the intervention of a jury of six, and desired to be so tried. The question reserved for the opinion of the Court was whether he had the right to be so tried.

Section 66 provides that where the charge is (*inter alia*) having committed or attempted to commit theft, embezzlement, or obtaining money by false pretences, or receiving stolen property, in any case in which the value of the whole property stolen, embezzled, or received does not, in the opinion of the trial Judge, exceed $200, the charge shall be tried in a summary way, and without the intervention of a jury.

Section 67, as amended, provides that where the person is charged with any other criminal offence, the same shall be tried by the Judge with the intervention of a jury of six.

The judgment of the Court was delivered by

SCOTT, J.—The charge in this case being one of theft simply, I can see no reason for holding that it is not within the provisions of this section. It is true that the punishment that may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property, but the nature of the offence and the value of the property stolen are the only matters which can be taken into consideration in ascertaining whether the charge is within the section referred to.

In my opinion the conviction should be affirmed.

GRADY v. OLSEN.

Partnership—Holding out—Estoppel—Ratification.

An appeal by the defendant Tierney from the judgment of ROULEAU, J., in favour of the plaintiff, in an action for the price of goods alleged to have been sold to the firm of Olsen & Tierney. The goods were ordered by Olsen as for the firm. The appellant denied that he was ever in partnership with Olsen, or that he had ever authorized Olsen to so represent. There was contradictory evidence as to the appellant having, when at the plaintiff's store, recognized as proper the charge made in the plaintiff's books against the firm. The trial Judge accepted the account sworn to by the plaintiff and a witness on his behalf.

The judgment of the Court was delivered by

MCGUIRE, J.—The case is one of considerable doubt, but, on a full consideration of the evidence as it comes before us, I am not prepared to disagree with the trial Judge.

I think, however, that the weight of evidence is that there was in fact no partnership between Olsen and Tierney, and this is not inconsistent with the plaintiff's story that Tierney, by his conversation in the store, led him to believe they were partners. Accepting, however, the statement that Tierney did say they were partners, he was not estopped from showing the fact to be otherwise. It would have been different had this "holding out" as a partner occurred before the goods were given to Olsen. It cannot be said that the credit was given by reason of anything Tierney said in Grady's store. But here is a fact that Olsen, to Tierney's knowledge, had got goods on the credit of Olsen & Tierney, and having notice of this he not only did not repudiate Olsen's right to so get goods, but, on the contrary, ratified and confirmed his act. That is, knowing or believing that Olsen had assumed to have Tierney's authority to order goods on the credit of Olsen & Tierney, he tells the plaintiff that it was right and to send the bill to him and it will be paid. The doctrine of ratification is so well settled that it is quite unnecessary to lay it down at length. I may, however, refer to some cases in which it is clearly set forth, for example, Lord Blackburn's judgment in *McKenzie* v. *British Linen Co.*, 6 App. Cas. 82; *Wilson* v. *Turner*, 6 M. & G. 242; and the judgment of Martin, B., in *Brook* v. *Hook*, L. R. 6 Ex. 89, "which must now be taken to be an accurate statement of the law," as is said by Chief Justice Strong in *Scott* v. *Bank of New Brunswick*, 23 S. C. R. at p. 283. As observed by Martin, B.: "A ratification is not a contract, and requires no consideration"—a statement which, he says, is borne out by the language of Burton, J., in *Wilkinson* v. *Stoney*, 1 J. & S. 509.

I think, therefore, that the plaintiff was, by this ratification of Olsen's agency, placed in the same position as if Olsen had the authority he in effect claimed to have, and is entitled to succeed.

The appeal should be dismissed with costs.

Supreme Court of Canada.

QUEBEC.] [2ND APRIL, 1900.

ASBESTOS AND ASBESTIC CO. v. DURAND.

Negligence — Use of dangerous materials — Cause of accident — Arts. 1053, 1056, C. C.—Employer's liability—Common employment.

To permit an unnecessary quantity of dynamite to accumulate in dangerous proximity to employees of a mining company, in a situation where opportunity for damage might occur from the nature of the substance or through carelessness or otherwise, is such negligence on the part of the company as will render it liable in damages for the death of an employee from an explosion of the dynamite, though the direct cause of such explosion may be unknown; GWYNNE, J., dissenting.

Held, further, that, as the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions by fellow servants of the deceased could not exonerate the employees from liability for the negligence of a servant which may have led to the injury.

Regina v. *Filion*, 24 S. C. R. 482, and *Regina* v. *Grenier*, 30 S. C. R. 42, followed.

Laflamme, for the appellant.

L. C. Belanger, Q.C., for the respondent.

NOVA SCOTIA.]

INGLIS v. HALIFAX ELECTRIC TRAMWAY CO.

Negligence—Electric car—Excessive speed—Prompt action—Contributory negligence.

A cab-driver was endeavouring to drive his cab across the track of an electric railway when it was struck by a car and

damaged. In an action against the tramway company for damages, it appeared that the accident occurred on part of a down grade several hundred feet long, and that the motorman after seeing the cab tried to stop the car with the brakes, and, that proving ineffectual, reversed the power, being then about a car length from the cab. The jury found that the car was running at too high a rate of speed, and that there was also negligence in the failure to reverse the current in time to avert the accident; that the driver was negligent in not looking more sharply for the car; and that, notwithstanding such negligence on the part of the driver, the accident could have been averted by the exercise of reasonable care.

Held, affirming the judgment of the Supreme Court of Nova Scotia, 32 N. S. Reps. 117, that the last finding neutralized the effect of that of contributory negligence; that, as the car was on a down grade and going at an excessive rate of speed, it was incumbent on the servants of the company to exercise a very high degree of skill and care in order to control it if danger was threatened to anyone on the highway; and that from the evidence given it was impossible to say that everything was done that reasonably should have been done to prevent damage from the excessive speed at which the car was being run.

Harrington, Q.C., and *Covert*, for the appellants.

Borden, Q.C., for the respondent.

WALKER v. FOSTER.

Donatio mortis causa—Evidence of delivery—Delivery to third person.

W., wishing to dispose of his property after death without making a will, placed certain promissory notes in envelopes addressed to each of his children, and kept them for some years in a desk in his bedroom. When on his deathbed he delivered the keys of the desk to one D., instructing him to deliver after his death the envelopes to his children as addressed. The contents of the respective envelopes were shown to D., and then the envelopes were sealed up in his presence. They were delivered by D. as directed. In an action by the administrators of deceased's estate to recover

from one of the children damages for the conversion or detention of the property so delivered to him:—

Held, reversing the judgment of the Supreme Court of Nova Scotia, 32 N. S. Reps. 156, that D. was not the agent of the donor in the matter, but received the property for the benefit of the donee; that it was not material that the donee neither assented to the gift nor knew of it; that the property itself was delivered to D., but if only the key had been delivered, it would have been sufficient to effect a *donatio mortis causa*.

Roscoe, Q.C., for the appellant.

J. J. Ritchie, Q.C., for the respondents.

HART v. McMULLEN.

Easement — Sale of land — Severance of possession — Right of purchaser to easements.

The owner of two adjacent properties conveyed them to different persons. One of the purchasers erected a dam on his land, in the use of which he caused the water collected to flow back on the other property, which was on a higher level. In an action claiming damages for this injury, there was evidence that the former owner had also had a dam on the land, but that it had been abandoned years before, and was not in use at the time of the conveyance.

Held, affirming the judgment of the Supreme Court of Nova Scotia, 32 N. S. Reps. 340, that where two properties of one owner are sold at the same time, and each of the purchasers has notice of the sale to the other, any continuing easement passes with the sale, but the same must have been substantially enjoyed by the vendor at the time of the sale. Therefore, as the right to use the dam in this case did not exist when the conveyance was made, it could not be claimed by the purchaser.

Borden, Q.C., and *Harris*, Q.C., for the appellant.

Drysdale, Q.C., and *Layton*, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [12TH SEPTEMBER, 1899.

In re GLEN—FLEMING v. CURRY.

Local Master—Resignation—Concurrent appointments.

While an appeal from his report was pending a local Master sent a letter of resignation to the Attorney-General's department, and, without any acceptance of this resignation, a commission was issued appointing another gentleman "a local Master" for the county in question. Subsequently the appeal was allowed, and the report was referred back to "the Master" for the county.

Held, that there could not be two local Masters; that the action of the executive was equivalent to an acceptance of the resignation; and that the reference must proceed before the new incumbent of the office.

Judgment of a Divisional Court affirmed.

S. H. Blake, Q.C., for the appellants.

Aylesworth, Q.C., and *O. E. Fleming*, for the respondents.

[27th MARCH, 1900.

RYAN v. WILLOUGHBY.

Contract—Breach—Condition precedent—Inability to perform—Municipal corporations—Resignation of councillor.

The defendant, who was a municipal councillor, entered into a sub-contract with the plaintiff to do the brick and mason work under the plaintiff's contract with the municipality to build a town hall, that contract providing that the

contractor should not sub-let the work or any part thereof without the consent in writing of the architect and municipality, and this consent the plaintiff was to obtain. The municipality refused to consent to the sub-contract, on the ground that the defendant's services would be of value in the oversight of the contract.

Held, that there could not be imported into the defendant's sub-contract an agreement to resign his seat, as such an agreement to resign a public trust for private gain would be contrary to public policy and illegal, and that the defendant was not liable in damages because of the breach of an implied obligation to resign, though his resignation might, as the plaintiff contended, have enabled the plaintiff to fulfil the condition precedent on his part of obtaining the municipality's consent.

Judgment of a Divisional Court, 30 O. R. 411, 19 Occ. N. 165, reversed.

Watson, Q.C., and *J. A. Allan*, for the appellant.

Shepley, Q.C., for the respondent.

McMILLAN v. McMILLAN.

Will—Construction—Inconsistent clauses—Executory devise—Failure of issue—Estate in fee.

A testator, by the third clause of his will, devised a lot of land to a son, "his heirs and assigns forever," and in the fourth clause stated it to be "my will and desire, provided my (said) son shall have no lawful heir or children, that the above mentioned tract of land, after his death, that (the plaintiff) shall have it with all the right and title that my (said) son had to it heretofore." By the fifth clause he gave to his wife "the use" of half the lot "during life; after her decease my will is that the same shall belong to my (said) son, his heirs and assigns forever." The son died after the testator without having had any children:—

Held, that the fifth clause removed from the operation of the third and fourth clauses one-half of the lot, which vested in the son subject to the mother's life estate, while as to the

other half the son had under the third clause an estate in fee simple, subject under the fourth clause to an executory devise over in favour of the plaintiff, which, in the events which had happened, had taken effect.

Judgment of a Divisional Court, 30 O. R. 627, 19 Occ. N. 227, affirmed.

R. Smith, for the appellant.

J. H. Moss, for the respndent.

McINTOSH v. PORT HURON PETRIFIED BRICK CO.

Conversion—Tenant in common—Removal of chattel to foreign country.

An action for conversion of his interest in a chattel lies by one tenant in common against his co-tenants in common if the chattel owned in common is destroyed by them, or so dealt with by them as, in effect, to put an end to his rights.

In this case the removal of a brick making machine to a foreign country was held sufficient to support the right of action, the plaintiff's power of enforcing his rights in the Courts of this Province being thus interfered with

Judgment of a Divisional Court reversed.

S. H. Blake, Q.C., and *D. S. McMillan*, for the appellants.

Aylesworth, Q.C., and *J. H. Moss*, for the respondents.

ARMOUR, C. J.]

CHOATE v. ONTARIO ROLLING MILL CO.

Master and servant—Negligence—Dangerous process—Want of warning.

The plaintiff, while employed in removing the cut pieces from a pair of shears worked by steam power, was struck by a flying piece of metal and severely injured. The machine was perfect of its kind, and it was not shown that a screen or guard could have been used, and the plaintiff was aware that there was danger. The danger when steel was being cut was greater than when iron was being cut, and the accident happened when steel was being cut.

Held, that there should have been some warning that steel was about to be cut, and that this means of reducing the possible danger not having been adopted, the defendants were liable in damages as at common law.

Judgment of ARMOUR, C.J., affirmed

Osler, Q.C., and *John Greer*, for the appellants.

Teetzel, Q.C., and *A. M. Lewis*, for the respondent.

BREWSTER v. HENDERSHOT.

Church—Change in doctrine—Secession of members—Possession of land—Religious Institutions Act, R. S. O. c. 307—Trust.

Land was conveyed to certain persons in trust for a religious body called the United Brethren in Christ, and a congregation was organized and a church built. Subsequently a division took place in the religious body, and it was held, in *Itter* v. *Howe*, 23 A. R. 256, 16 Occ. N. 158, that the party to which the congregation in question adhered were seceders. This congregation continued to use the church, and, some of the original trustees having died, appointed new trustees to act with the survivors, and these trustees refused to give up possession to the representatives of what had been declared to be the true body.

Held, that the trustees must be treated as being trustees for the true body, who were entitled to enforce the trust and to have possession of the church, and that it was not necessary to organize another congregation and appoint new trustees for that congregation under the Religious Institutions Act.

Judgment of ARMOUR, C.J., 19 Occ. N. 218, reversed.

German, Q.C., for the appellants.

T. D. Cowper, for the respondents.

MEREDITH, C.J.]

PEACOCK v. COOPER.

Evidence—Negligence—Fire—Sparks from steamer.

In an action to recover the value of buildings destroyed by fire started, as was alleged, by sparks escaping from the

defective smokestack of a steamboat, evidence that on prior and subsequent days sparks of large size escaped from this smokestack may be admissible to prove its defective construction; but opinionative evidence that, having regard to the force and direction of the wind on the day in question, sparks of this size if they escaped might have been carried to the building in question is too conjectural and speculative.

Judgment of MEREDITH, C.J., affirmed.

Matthew Wilson, Q.C., for the appellants.

J. S. Fraser, for the respondent.

STRUTHERS v. TOWN OF SUDBURY.

Assessment and taxes—Exemptions—"Public hospital"—R. S. O. c. 224, s. 7 (5).

A hospital carried on by and for the benefit of two medical practitioners, and used chiefly by patients paying fees, though to some extent by indigent patients, and in receipt of a government grant under the Charity Aid Act, R. S. O. c. 320, is a public hospital within the meaning of s.-s. 5 of s. 7 of the Assessment Act, R. S. O. c. 224, and exempt from taxation.

Judgment of MEREDITH, C.J., 30 O. R. 116, 19 Occ. N. 34, affirmed.

Wallace Nesbitt, Q.C., and *Clary*, for the appellants.

Aylesworth, Q.C., for the respondents.

EWING v. HEWITT.

Nuisance—Highway—Obstruction—Continuing nuisance created by another.

The owner of a house abutting on a highway placed without authority a trap-door in the sidewalk in order to obtain an entrance to his cellar, the hinges of the trap-door projecting about an inch above the sidewalk. The defendant obtained title from this owner, and continued to use the trap-door, and the plaintiff, while lawfully using the highway, stumbled against the hinges and was hurt.

Held, that the defendant could not be held to be continuing the nuisance, as she had no title to the highway and no right, strictly speaking, to remove the trap-door constructed by another, and that, as the accident was not caused during or by her user of the trap-door, she was not liable.

Judgment of MEREDITH, C.J., reversed.

Marsh, Q.C., for the appellant.

John MacGregor and *R. G. Smyth*, for the respondent.

ROSE J.]

CALDWELL v. TOWN OF GALT.

Municipal corporations—Highways—Obstruction—By-law—Injunction.

In an action to restrain the defendants from enforcing a by-law to compel the plaintiff to remove a verandah projecting some distance over one of the streets of the town, it was held, on the evidence, that the verandah had been built after the street had been dedicated and laid out, and that it was therefore an unlawful obstruction; but, as it had been in existence for a great many years, and as no special necessity for its removal was made out, the Court refused to grant the defendants a mandatory injunction against the plaintiff for its removal, leaving them to enforce their by-law in such way as they should be advised.

Judgment of ROSE, J., varied.

James Bicknell, for the appellant.

DuVernet and *Card*, for the respondents.

ROBERTSON, J.]

ARMSTRONG v. LYE.

Merger—Equitable right to a charge—Subsequent acquisition of the fee—R. S. O. c. 121, ss. 8, 9, 10.

In taking the accounts under the judgment reported 27 O. R. 511 and 24 A. R. 543, it was held that the defendant Lye had no right to an equitable charge, in priority to the

plaintiff's claim, for sums paid by Lye to prior incumbrancers before the conveyance of the land to him, his potential equity not bringing him within ss. 8, 9, and 10 of R. S. O. c. 121, and there being no evidence of intention to preserve the right to the equitable charge.

Judgment of ROBERTSON, J., affirmed.

Aylesworth, Q.C., and *F. A. Hilton*, for the appellant.

Watson, Q.C., and *Ruddy*, for the respondent.

FALCONBRIDGE, J.] [31ST JANUARY, 1900.

REGINA v. ST. CLAIR.

Criminal law—Summary trial—Habeas corpus—Certiorari—Writ of error—Appeal—Evidence—Depositions in other proceedings—Counsel's consent.

A conviction by a magistrate under the sections of the Criminal Code relating to the summary trial of indictable offences may be brought up for review by writs of *habeas corpus* and *certiorari*, a conviction under those sections not being matter of record in such sense as to make it reviewable only by writ of error.

Upon the hearing of a charge under these sections, evidence in other proceedings against another prisoner is admissible upon the consent of the accused's counsel.

Judgment of FALCONBRIDGE, J., affirmed.

E. B. Stone, for the appellant.

John R. Cartwright, Q.C., for the Crown.

STREET, J.] [27TH MARCH, 1900.

FLOER v. MICHIGAN CENTRAL R. W. CO.

Trial—Jury—Failure to agree—Motion for judgment—Dismissal of action—Rule 780.

When in an action tried with a jury the presiding Judge holds that there is evidence to submit to the jury and refuses a nonsuit, he cannot, upon the jury disagreeing, himself decide under Rule 780 in the defendant's favour upon his own view of the evidence.

Judgment of STREET, J., 30 O. R. 635, 19 Occ. N. 194, affirmed.

D. W. Saunders and *J. Montgomery*, for the appellants.

F. A. Anglin, for the respondent.

SCOTT v. MELADY.

Sale of goods—Statute of Frauds—Delivery—Acceptance.

The defendants agreed to buy from the plaintiff ten thousand bushels of No. 2 red wheat, at $1.12 per bushel, to be delivered f.o.b. a vessel to be provided by the defendants, who were to pay freight and insurance, and delivery was to be made to them on payment of a sight draft for the price. The captain of the vessel gave the plaintiff a bill of lading, describing him as the consignor, and in it, under the heading "consignees," was written "order of Bank of Montreal, advise Melady & McNairn (defendants)." A draft for the price, drawn by the plaintiff upon the defendants, was attached to the bill of lading and discounted, but the defendants refused to accept this draft.

Held, that there was, upon these facts, no final appropriation of the wheat or delivery thereof to the defendants, and that the property therein would not pass to them until acceptance of the draft, or payment or tender of the price.

Held, also, that neither the shipment in the vessel provided by the defendants, nor the taking by defendants of samples of the cargo for inspection, constituted an acceptance within the statute.

Judgment of STREET, J., affirmed.

Aylesworth, Q.C., and *Rankin*, Q.C., for the appellants.

Charles Millar, for the respondent.

HOOD v. COLEMAN PLANING MILL AND LUMBER CO. OF BURLINGTON.

Principal and surety—Application of payments—Mechanic's lien.

The plaintiff, who was a director of a company for which the defendants were doing work, indorsed the company's

note in the defendants' favour for part of the defendants' claim. The note was discounted by the defendants, and was dishonoured, and the holders obtained judgment against the plaintiff, who did not, however, pay any part of the claim. Subsequently the defendants obtained, in mechanic's lien proceedings instituted by other creditors, a dividend of eighty-one cents on the dollar of their total claim, including the portion covered by the note.

Held, that they were not bound to apply the amount received first in satisfaction of the portion of the claim covered by the note, nor entitled to apply it first in satisfaction of the portion of the claim not covered by the note, but were bound to apply it *pro rata* on the whole claim.

Judgment of STREET, J., affirmed.

Washington, Q.C., for the appellants.

D'Arcy Tate, for the respondent.

DRAINAGE REFEREE.]

In re TOWNSHIP OF OXFORD AND TOWNSHIP OF HOWARD.

Drainage—Injuring liability—Natural watercourse—R. S. O. c. 226, s. 3, s.-s. 3.

Under s.-s. 3 of s. 3 of R. S. O. c. 226, lands in one municipality from which water has been caused to flow upon and injure lands in another municipality, either immediately, or by means of another drain, or by means of a natural watercourse, may be assessed and charged for the construction and maintenance of a drainage work required to relieve the injured lands from such water.

In re Townships of Orford and Howard, 18 A. R. 496, *In re Townships of Harwich and Raleigh*, 21 A. R. 677, and *Broughton* v. *Township of Grey*, 27 S. C. R. 495, distinguished.

Judgment of the Drainage Referee affirmed.

William Douglas, Q.C., and *Shepley*, Q.C., for the appellants.

Matthew Wilson, Q.C., for the respondents.

In re TOWNSHIP OF COLCHESTER NORTH AND TOWNSHIP OF GOSFIELD NORTH.

Drainage—Report of engineer—Failure to take oath—R. S. O. c. 226, ss. 55, 57.

Taking the oath prescribed in s. 5 of the Municipal Drainage Act, R. S. O. c. 226, is an essential prerequisite to the exercise of jurisdiction by the engineer under s. 75 of that Act.

While an appeal to the Drainage Referee against a report is pending, the initiating municipality cannot refer back the report to the engineer for amendment.

Judgment of the Drainage Referee reversed.

Britton, Q.C., and *Langton*, Q.C., for the appellants.

A. H. Clark, for the respondents.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., FALCONBRIDGE, J., 10TH APRIL, 1900.

ALLISON v. BREEN.

Limitation of actions—Judgment—Revivor—Time—Notice—Ex parte order—Application to set aside.

Decision of STREET, J., and the Master in Chambers, *ante* p. 103, refusing to set aside order reviving judgment, affirmed on appeal.

Boice v. *O'Loane*, 3 A. R. 167, as to the lifetime of a judgment, followed in preference to English decisions.

The practice of dealing with the question raised on an application to set aside an *ex parte* order as if the application were a substantive one for such order, approved.

Tytler and *C. J. McCabe*, for the appellant.

J. J. Maclennan, for the plaintiff by revivor.

[23RD APRIL, 1900.

SYDNEY CHEESE AND BUTTER FACTORY ASSOCIATION v. BROWER.

Discovery—Action for account—Denial of right—Production of books—Prejudice.

To an action by an incorporated association of cheesemakers against their president and salesman for an account of all moneys received by him for or on behalf of the plaintiffs for three years past, and the application thereof, and for delivery up of all books and documents in his possession belonging to the plaintiffs, and for an account of profits made by the defendant, one of the defences was that the defendant undertook the sale of the plaintiffs' cheese as a part of his own business, and that it was expressly agreed that he should not be called upon to divulge the names of the persons from whom he received orders, or give any other information touching his business or the account of sales or the bank account in connection with his business, and when examined for discovery he objected to produce his books and documents shewing sales and prices realized and persons to whom sales made, because, as he alleged, that would in effect give the plaintiffs what they sought in the action before they had established their right to it, which was expressly contested.

Held, that, as the fiduciary relationship existing between the parties was practically admitted, the position of the plaintiffs in seeking accounts and inquiries was not exactly like that of a plaintiff whose right depended on his establishing a case for them at the hearing. The defendant set up an extraordinary agreement, the probability of establishing which was not very great, and this was an element in determining the matter in the exercise of a sound discretion. The plaintiffs were, therefore, entitled to the discovery.

Shepley, Q.C., for the defendant.

A. Hoskin, Q.C., and *S. Masson*, for the plaintiffs.

[ARMOUR, C.J., STREET, J., 18TH APRIL, 1900.

APPLEBY v. TURNER.

Judgment—Action on bond—Rule 580—Writ of summons—Special indorsement—Statement of claim—Service by posting—Rule 574—Motion for judgment—Assessment of damages.

An action against the sureties in an appeal bond to recover the plaintiffs' costs of an appeal is in the nature of a claim for damages requiring assessment (see Rule 580), and a special indorsement of the writ of summons is inappropriate, and a judgment for default of appearance or default of defence is a nullity, not curable by delay or acquiescence.

The defendants in this case not having appeared, the plaintiffs filed and posted up copies of a statement of claim, without filing the writ of summons and affidavit of service.

Held, that the posting of the statement could not, having regard to Rule 574, be treated as a service upon the defendants.

But, even if it could be so treated, a motion for judgment thereon and an assessment of damages would be necessary.

Star Life Assurance Society v. *Southgate*, 18 P. R. 151, 18 Occ. N. 229, followed.

Hislop, for the defendants.

W. E. Middleton, for the plaintiffs.

[BOYD, C., 17TH APRIL, 1900.

KING v. ROGERS.

Limitation of actions—Acknowledgment in writing—Revival of liability—Agent of executor—Letter to third person—Admissibility.

The executor of the will of one of the joint makers of a promissory note proved the will after the debt on the note as against the testator or his estate became barred by the Statute of Limitations. The will directed that all the testator's just debts should be paid by his executors as soon as possible after his death. The executor, who lived out of Ontario, executed a power of attorney to the other joint maker

of the note, who was primarily liable on it, and against whom it had been kept alive by payments, to enable him in Ontario "to do all things which might be legally requisite for the due proving and carrying out of the provisions" of the will —the executor having at this time no knowledge of the note.

Held, that a letter written by the surviving maker shortly after the execution of the power of attorney, even if in its terms sufficient, was not such an acknowledgment, within R. S. O. 146, s. 1, as would revive the liability after the expiry of six years; for there was no trust created by the will for the payment of debts, nor was there any legal obligation on the part of the executor to pay statute-barred debts, and the surviving maker was not an agent "duly authorized" to exercise the discretion which an executor has to pay such debts.

Three years later the executor wrote to the holder of the note to the effect that the holder ought to look to the surviving maker for payment, as he was now doing well.

Held, that this, though some recognition of the debt, was not sufficient—there must be such a recognition as amounts to a promise or undertaking to pay.

Just before this action was brought to recover the amount of the note, the executor wrote to the plaintiffs' solicitors asking them not to take any further steps till he could hear from the surviving maker; and to the latter he wrote: "The debt is owing, and they are anxious to get their estate settled up."

Held, insufficient as an acknowledgment, and that the letter to a third person—not the creditor—was not admissible.

Goodman v. *Boyes*, 17 A. R. 528, followed.

D. E. Thomson, Q.C., and *W. N. Tilley*, for the plaintiffs.

F. E. Hodgins, for the defendant Elford.

In the County Court of the County of Perth.

[BARRON, Co.J., 20TH JANUARY, 1900.

McCARTHY v. McCARTHY.

Fixtures—Field stones—Removal from soil—Piling up—Intention of building—Lumber—Roof of "lean-to"—Pulling down—Fence rails—Intention to build fence—Machinery—Annexation of, to freehold—Detachable part--Estoppel.

The plaintiff and defendant were brothers. The defendant was the administrator of the estate of another brother, who died intestate. The plaintiff became the purchaser at an auction sale held by the defendant, as administrator, of a farm which belonged to the deceased. After the lands had been knocked down to the plaintiff, the auctioneer proceeded to sell some articles which were on the farm, viz., some field stone, some lumber, scantling, and boards, some fence-rails, and a hay-fork, the plaintiff protesting against the sale and claiming these articles as part of his purchase. With the exception of the lumber, none of these articles was mentioned in the advertisement for sale.

This action was brought to recover the value of the articles sold.

The stone at the time of the sale was piled up at the side of the lane leading to the barn and some near to the barn. The plaintiff said that about half of the total quantity was there as far back as 1878, when the deceased obtained the farm from his father. He also said that it had been gathered up from the farm. As to the other half the plaintiff's evidence was merely suppositional. The defendant swore that the deceased bought some of the stone from one Parker, but he could not say what quantity. There was also evidence that the deceased had talked of using the stone to build a bank barn.

Held, without deciding whether field stones which lie imbedded in or upon the surface of the soil are part of the soil, that their character is at all events changed when they

are taken from the place where they are found and piled up in another place. The stones, by the act of severance ceased to be a natural deposit and became chattels; and the supposed intention of the deceased to use them for building purposes did not again change their character.

Lewis v. *Gordon*, 15 O. R. 252, specially referred to.

Tucker v. *Linger*, 21 Ch. D. 18, distinguished.

Held, as to the lumber, upon the evidence, that, although it had at one time formed part of the roof of a "lean-to," it had been taken apart by the intestate before his death and divided up into boards, and so had become chattels.

Held, as to the fence-rails, that, although a fence is part of the realty, and although it might be that material placed along the line of a contemplated fence, but not used because the fence is not completed, also belongs to the freehold, yet the rails in question here did not become fixtures, because, so far as the evidence shewed, there was an entire absence of contemplation to erect them into a fence, and they were, therefore, chattels which the defendant had the right to sell.

Am. and Eng. Ency. of Law, vol. 7, p. 905, referred to.

The hay-fork in question was part of a plant consisting of a track, a truck, pulleys, a rope, and the fork. The track was fastened with bolts or screws to the barn roof. Without the track, the truck would be useless; in fact, each of the articles was a joint in the whole, and the whole would be useless without its parts, or without any one of them.

Held, following *Gooderham* v. *Denholm*, 18 U. C. R. 214, that the hay-fork in question was a fixture, and the circumstance that it could be used again in connection with another track, truck, pulleys, and rope, of similar kind and dimensions, did not deprive it of its character.

There was evidence that the plaintiff, prior to his buying the farm, expressed his desire that everything on the farm, including the articles in question, should be sold as chattel property, and the defendant therefore contended that the plaintiff was estopped from complaining, but this question was not decided.

Judgment for the plaintiff for $10 with Division Court costs, and with a set-off to the defendant of the excess of his costs incurred in the County Court over what would be taxable as his costs of defence in a Division Court.

Mabee, Q.C., for the plaintiff.

F. H. Thompson, for the defendant.

[Both parties appealed from this judgment to a Divisional Court of the High Court. Both appeals were on the 6th March, 1900, dismissed with costs.]

In the County Judge's Criminal Court for the County of York.

[McDougall, Co.J., 11th April, 1900.

REGINA v. SANDERS.

Criminal law—Keeping disorderly house—Common gaming-house—"Gain"—Evidence—Criminal Code, s.s. 196 (a), 198.

In order to obtain, under s. 198 of the Criminal Code, a conviction of a person for keeping a disorderly house, to wit, a common gaming-house, as defined by s. 196 (a), the Crown must show by satisfactory evidence that the person charged is deriving some gain or profit from keeping the house, room, or place, and allowing games of chance to be played therein.

And where it was shown that the only source of profit to a person in whose room a game of cards was played for money stakes was a small deduction made (with the consent of the players, and not as a matter of right or a condition of any one being admitted to the game) from the total stakes upon the table at various times, for the ostensible purpose of paying for the refreshments provided, and it was not shown that the total sum derived from such deductions was more than sufficient to pay for the refreshments, the Judge refused to convict.

The defendant was charged under s. 198 of the Criminal Code with keeping a disorderly house, to wit, a common gaming-house, at a place in the city of Toronto.

By s. 198, "every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house, or common betting-house, as hereinbefore defined."

By s. 196 (*a*), "a common gaming-house" is defined as "a house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance."

The defendant, by his own election, was tried summarily before the Judge of the County Court without a jury.

Dewart, Q.C., for the Crown.

DuVernet, for the defendant.

McDOUGALL, Co.J.—The facts established by the Crown show that the defendant, who keeps a large billiard room in Yonge street, in the city of Toronto, and who resided in rooms in the same building above his billiard room, was in the habit of inviting his friends to his private apartment once or twice a week and engaging with them in a game of poker for money stakes. On the night in question the police raided the apartment and found the defendant and nine other persons in the room. On the table were cards and money, and it was apparent, and, indeed, not denied, that the party, including the defendant, just before the police entered the apartment had been playing a game of cards for money stakes. Several of the persons found by the police were put in the box by the Crown and told their story of what had been transpiring. McIntosh, a billiard marker in the service of the defendant, said that the defendant and six or seven of his friends on the night in question were having a quiet game of cards—poker; that the game was poker and the stakes were limited, which the witness described as 25c. ante and 50c. limit. The defendant put up his own stake the same as the others, and took his chance in the game. No charge was made to any of the persons found in the room for their admission thereto, and the chances of the game were alike favourable to all the players. Refreshments were provided by the defendant during the evening. Sutcliffe, one of the players, stated that the parties had agreed that the defendant might take out of what was called "the pot" sometimes 5 cents and sometimes 10 cents towards recouping himself for the cost of the refreshments provided by him. These deductions were not made from every pot, but out

of most of them. The defendant as one of the players paid into the pot in the first instance the same amount as the other players. Sutcliffe says the amount taken out for refreshments was small. He says he went there himself because he liked a game of poker sometimes; that only those whom he understood to be friends or acquaintances of the defendant were present; that it was in the defendant's private room used by him and his family that the cards were played; so far as he could see, just the same as a game in a private person's house; that the game was perfectly fair; that there was no bank kept, no charge for admission, and the defendant was always one of the players.

The police say that the defendant had a reputation of keeping a gambling house; that they had raided on a former occasion, but had not succeeded in catching those in the room actually engaged in a game. On the night in question they were actually so engaged as they entered the room, some of them being seated at the table, and money and cards were lying on the table. The police took possession of some $6.70.

The clause in the statute upon which the Crown case depends reads as follows:

"A common gaming-house is—

(*a*) A house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance."

The defence admits the card-playing for money in the defendant's house, but say it was not for gain, and that it was no more contrary to the statute than any game of cards for money in any gentleman's private house.

The Crown has to depend upon the defendant's friends called as Crown witnesses to establish the nature of the game played, and the conditions and circumstances under which it was being played, and no evidence of any gain to the defendant is given beyond the fact that the defendant, with the consent of the players — not as a matter of right nor as a condition of anyone being admitted to the game— was allowed from time to time to take 5 cents or 10 cents from stakes on the table to pay the cost of what the players ate and drank. These refreshments were sworn to be beer and whisky and sandwiches — cold meat and bread and

butter. The defendant himself joined in the game as one of the players, and the others players did not think it was fair that the defendant should pay out of his pocket for what the others ate and drank.

The English statute 17 & 18 V. c. 38, s. 4, relating to gaming, differs materially from our s. 196 (*a*). The section in the English Act renders liable to summary conviction and a fine not exceeding £500 "any person, being the owner or occupier or having the use of any house, room, or place, who shall use the same for the purpose of unlawful gaming being carried on therein," also "a person as owner or occupier knowingly allowing the room to be used by others for that purpose," also "every person having the care or management or assisting in conducting the business of any house," etc., etc.

Our Act, on the other hand, only constitutes a house or room a common gaming house *where it is kept for gain.* I take it, therefore, that the Crown, in order to obtain a conviction, must show by satisfactory evidence that the person charged is deriving some gain or profit from keeping the room and allowing games of chance to be played therein. In the present case the evidence does not establish how much this 5 cents and 10 cents contribution of the players would amount to in an evening. There is nothing to indicate what was the cost or approximate cost of the refreshments provided by the defendant. If it had appeared that the "rake off" (as one of the witnesses expressed it) amounted to $8 or $10, and the refreshments only cost $3 or $4, it might well be contended that the defendant was making a profit or gain of about $5 an evening for the use of his rooms. Sutcliffe, the only witness who speaks on the point, says the money realized from the 5 cents and 10 cents contributions only amounted to a very small sum. He further says that there were some pots from which no deduction was made. Whatever might be the conjectures as to whether the defendant may not have realized a tidy room rent from a surplus of the moneys so supplied him for refreshments, the evidence does not supply the information.

In the absence of more definite evidence upon this point, I think it would not be proper to convict.

MANITOBA.

In the Queen's Bench.

[BAIN, J., 9TH APRIL, 1900.

REGINA v. GREAT WEST LAUNDRY COMPANY.

Criminal law—Manslaughter—Indictment of corporation—Punishment—Criminal Code, s. 236.

Demurrer to an indictment. The first count alleged that the Great West Laundry Company, limited, was a corporation incorporated under the provisions of the Manitoba Joint Stock Companies Act; that on the 31st January, 1900, the said company was carrying on a laundry business by means of a steam engine, shafting, and other machinery maintained by it, with the assistance of persons employed by the company, and it became and was the duty of the company to take reasonable precautions against and to use reasonable care to avoid danger to the lives of said employees from said shafting and machinery coming in contact with said employees while the same was in rapid motion, yet the said company on the date last aforesaid and for a long time prior thereto unlawfully and negligently omitted to take such reasonable precautions and to use such reasonable care, but, on the contrary, had erected and was maintaining a rapidly revolving shaft at a distance of about sixteen inches above the floor and two or three feet from the side wall of the room where a number of female employees were working, which shaft was then, and had for a long time been, entirely uncovered and unprotected, in consequence whereof one Gudrun Johansson, a female in the employment the said company, on the date aforesaid, while in the employment of her usual work as such employee, and in the act of stepping over said shaft, was caught therein by her skirts and thrown with violence to the floor, and so wounded and injured that she died on the same day.

The second count alleged that the Great West Laundry Company, limited, a corporation duly incorporated, did on the 31st January, 1900, unlawfully kill and slay one Gudrun Johansson.

The accused corporation demurred to the first count on the ground that it did not charge any indictable offence, and to the second count on the ground that an indictment for manslaughter would not lie against a corporation.

In support of the demurrer it was argued that a corporation, as such, is not in law capable of committing manslaughter, and that, even if it were convicted of such an offence, the law has made no provision for punishing it therefor.

Counsel for the Crown referred to and relied upon ss. 220, 213, 635-639, 3 (*t*), of the Criminal Code.

Held, that the first count was objectionable in that it did not more directly charge the accused with having committed a specified indictable offence. What it contained was sufficient to give the accused notice that it was charged with having caused the death of the person named, by its negligence, and for the purpose of disposing of the demurrer the whole indictment might be treated as one for manslaughter, the alleged homicide having occurred under the circumstances set forth in the first count.

An indictment will not lie against a corporation for manslaughter. Even if a corporation could be indicted and convicted for such an offence, the conviction would be futile, for there is no provision of law under which any punishment could be imposed.

As the law stands at present, a corporation cannot be made criminally liable for such acts as are spoken of as crimes in the more popular sense of the word; that is, crimes of which the essence is the personal criminal intent or malice, or negligence carried to the extent that it amounts to wilfully incurring the risk of causing injury to others. A criminal or guilty mind has always been an essential element in the legal conception of crime in English law; and, as a corporation, as it used to be said, is invisible and exists only in contemplation of law (Hawkins P. C., Bk. 1, c. 65, s. 13),

and so cannot be actuated by a personal guilty mind, the opinion prevailed at one time that it could not be held criminally liable, and this view was pressed in argument as late as in *Regina* v. *Birmingham R. W. Co.*, 3 Q. B. 223. But now a corporation may in certain cases be held amenable to the criminal law. The opinions of several English Judges are to be found that a corporation cannot be indicted for such a crime as manslaughter: *Regina* v. *North of England R. W. Co.*, 9 Q. B. 315; *Pharmaceutical Society* v. *London Supply Association*, 5 App. Cas. 869.

There was an additional objection which would have to prevail, that a corporation cannot be punished for manslaughter. Under R. S. C. c. 162, s. 5, which was repealed by the Criminal Code, the punishment for manslaughter was imprisonment for life, or "such fine as the Court awards in addition to or without any such imprisonment." But by s. 236 of the Code every one who commits manslaughter is liable to imprisonment for life; there is now no authority for the substitution of a fine. The accused was entitled to have judgment on the demurrer.

Howell, Q.C., for the accused.

Patterson and *A. J. Andrews*, for the Crown.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 15TH JANUARY, 1900.

ROGERS v. REED.

Summary judgment*—*Writ of summons*—*Special indorsement*—*Account stated*—*Appeal*—*Mistake in appeal book*—*Preliminary objection.

An objection to the hearing of an appeal on the ground that the appeal books are defective and erroneous is not a preliminary objection within s. 83 of the Supreme Court Act.

The particulars of the plaintiffs' claim indorsed on the writ of summonses were:

"1899.

"November 30.	To	balance of account rendered, which balance has been stated ....$	51 70
	"	balance of account rendered and stated owing to Hunter Brothers, and duly assigned for value by assignment dated the 1st day of December, 1899, to the plaintiffs, and of which express notice in writing has been given to the defendant	167 15
			$218 85"

Held, not a special indorsement such as would support a summary judgment under Order XIV.

Appeal from order of FORIN, Lo.J., giving the plaintiffs leave to sign judgment for $167.15 allowed.

Duff, for the appellant.

A. E. McPhillips, for the respondents.

Supreme Court of Canada.

ONTARIO.] [20TH APRIL, 1900.

In re LEAK AND CITY OF TORONTO.

Municipal corporations—Arbitration and award—Lands injuriously affected —Compensation—Damages—Interest.

The corporation of the city of Toronto, in 1891, passed a by-law for the construction of new iron and steel bridges across railway tracks on Dundas street west. The corporation having acquired by expropriation the land necessary for the purpose, the County Court Judge was appointed arbitrator to assess the value thereof and also the compensation to be given to the owners of other lands affected. L., one of the latter, was awarded $8,000 and interest from the date of passing the by-law. On appeal by the corporation to a Judge of the High Court from the arbitrator's award, it was sent back for the arbitrator to state whether L.'s land was taken or only injuriously affected, with an intimation that, if it was the latter, no interest could be given. The award was then altered by striking out the amount for interest, and, as altered, was set aside by a Divisional Court, 29 O. R. 685, 18 Occ. N. 355, but restored by the Court of Appeal, 26 A. R. 351, 19 Occ. N. 263.

Held, affirming the last judgment, that interest in such case was not given by any statute, and the whole course of common law was opposed to it. The award, as altered, was therefore valid.

Du Vernet, for the appellant.

Fullerton, Q.C., and *W. C. Chisholm*, for the respondents.

[23RD APRIL, 1900.

WATERS v. MANIGAULT.

Appeal—Jurisdiction—Title to land—Duty—Future rights—60 & 61 V. c. 34—Ditches and Watercourses Act.

W. applied for an injunction to restrain M. and others from proceeding to construct a ditch on land adjoining his own under an award, which had been lost, and which W. claimed was illegally obtained. He also alleged that the ditch would bring water on his land and injure it. His action was dismissed by the trial Judge, whose judgment was affirmed by the Court of Appeal. On appeal to the Supreme Court of Canada:—

Held, that no question of title to real estate or any interest therein was involved so as to permit of an appeal under s. 1 (*a*) of 60 & 61 V. c. 34; that the charge upon W.'s land for a proportionate part of the cost of the ditch by reason of benefit was not the taking of a duty under s.-s. (*d*); and that no future rights of W. were affected; the case was not, therefore, one in which an appeal would lie.

As the respondent might have taken exception to the jurisdiction in time to have saved the expense of printing the case and factum for the appeal, he was only allowed the costs of a motion to quash.

Appeal quashed with costs.

Folinsbee, for the appellant.

Stuart, Q.C., for the respondent.

[27TH APRIL, 1900.

QUEBEC FIRE INS. CO. v. BANK OF TORONTO.

Fire insurance—Proofs of loss—Increase of risk—Appeal—Questions of fact.

The John Eaton Company of Toronto, whose premises were destroyed by fire in 1897, had insurance on the stock amounting to $219,000, and actions were brought against five companies by the Bank of Toronto, as assignees of the claims by an assignment after the loss. The companies defended on the grounds of false and fraudulent statements in

the proofs of loss; that the fire was caused by the act of the insured; that the risk was increased by overstocking and heavy insurance; and that the bank was not in law the assignee of the policies. Two of the causes were tried before FERGUSON, J., and the others by MEREDITH, C.J., all without a jury, and all resulted in a verdict for the bank, which was sustained by the Court of Appeal. On appeal to the Supreme Court of Canada:—

Held, per STRONG, C.J., and TASCHEREAU, SEDGEWICK, and KING, JJ., that the appeal depended almost entirely on questions of fact, passed upon by two Courts, and for a second appellate Court to reverse the decisions would be going in the teeth of many former decisions; that on the question of law, that the proofs were defective, it being claimed that according to the evidence the accounts of stock were padded and the true value was much less than the insurance, the reasons given by the trial Judges and Judges in appeal were conclusive; that the explanation of the discrepancy had been accepted by the trial Judges; and that, on the question of increase of risk, the Ontario Courts had adopted too narrow a construction in holding that such increase could only be effected by direct dealing with the property insured; but there was no increase in fact.

GWYNNE, J., was of opinion that the whole case was open and that the Court should pronounce upon it without considering themselves bound by the findings in the Courts below.

Aylesworth, Q.C., *L. G. McCarthy*, and *F. B. Osler*, for the appellants.

S. H. Blake, Q.C., *Riddell*, Q.C., and *R. McKay*, for the respondents.

QUEBEC.] [4TH MAY, 1900.

STANDARD LIFE ASSURANCE CO. v. TRUDEAU.

Appeal—Amount in dispute—Pleas—Incidental matters.

Poirier, for whose murder in the Province of Quebec his wife was hanged, had two policies of insurance on his life for $1,000 each. After her death the insurance company brought

an action to have the policies cancelled, and an appeal was pending in this Court from a judgment against the company in such action. The mother of Poirier, pending such action, sued the company for $1,000, half of the insurance, as one of the heirs of the insured, and obtained judgment in all the Quebec Courts, the company having by its pleas raised the same issues as in the former action, and asked for cancellation of both policies. The company sought to appeal to this Court in this action also, and applied to the Court for approval of security, which had been refused by the Registrar.

Held, refusing such application, that the amount in dispute was only $1,000; that the company could not by the pleas increase the demand so as to give jurisdiction to the Court.

Falconer, for the motion.

Fitzpatrick, Q.C., S.-G., contra.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

FALCONBRIDGE, J.] [2ND APRIL, 1900.

SNELL v. TORONTO R. W. CO.

Master and servant—Negligence—Street railway—Motorman—Person in charge or control—Workmen's Compensation for Injuries Act.

The motorman of a car running on an electric system is a "person who has the charge or control" thereof, within the meaning of s.-s. 5 of s. 3 of the Workmen's Compensation for Injuries Act, R. S. O. c. 160, and his employers are liable in damages to a fellow servant for injuries sustained while in discharge of his duty, owing to the motorman's negligence in passing too close to a waggon which is moving out of the way of the car.

Judgment of FALCONBRIDGE, J., affirmed.

James Bicknell, for the appellants.

Robinette and *J. M. Godfrey*, for the respondent.

STREET, J.] [24TH APRIL, 1900.

SMYLIE v. THE QUEEN.

Crown—Timber licenses—Renewal—Manufacturing condition—Constitutional law—61 V. c. 19 (O.)

The Act 61 V. c. 19 (O.), making applicable to timber licenses the condition approved by order-in-council of the 17th February, 1897, that all pine timber cut under such licenses shall be manufactured into sawn lumber in Canada, is *intra vires*, and applies to licenses issued after the passing of the Act in renewal of licenses in force at the time of its passage.

Judgment of STREET, J., 31 O. R. 202, 19 Occ. N. 391, affirmed.

H. J. Scott, Q.C., for the appellants.

S. H. Blake, Q.C., and *Walter Gow*, for the respondent.

HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 17th MARCH, 1900.

COOLIDGE v. NELSON.

Will—Annuity—Agreement constituting charge on land—Necessity for registration—Notice—Registry Act.

The testator by his will directed his executors to pay his widow an annuity for the support and maintenance of one of his sons until he became of age; but, if there were not sufficient funds therefor, it was to be a charge on separate parcels of land severally devised to three of his other sons. There were sufficient funds in the executors' hands for the payment of this annuity, but by an agreement, for valuable consideration, made between the widow and the said devisees of the

lands, it was agreed that the annuity should not be paid out of such moneys but should be a charge upon such lands, the intention being that such moneys should be kept in hand for the payment of a legacy to be paid to the first named son on his attaining his majority. A sale was subsequently made by one of the sons of the parcel of land devised to him. The purchaser, being informed as to an agreement having been entered into, but being at the same time told that it in no way affected the land, but merely created a personal obligation to pay the annuity, made no further inquiry with regard to it.

Held, that the purchaser could not be deemed to have purchased the land with notice of the contents of the agreement so as to be affected thereby.

Notice at law under the Registry Act discussed.

Shepley, Q.C., and *C. H. Widdifield*, for the defendant.

Aylesworth, Q.C., for the plaintiff.

[ARMOUR, C.J., STREET, J., 10TH APRIL, 1900.

In re TOWNSHIP OF BOTHWELL AND BURNSIDE.

Sessions—Appeal—Order for costs—Distress warrant—Criminal Code, ss. 880 (e), 897.

On an appeal to the General Sessions of the Peace from a conviction of a police magistrate, the chairman gave judgment, signing the following minute: "Appeal in this case dismissed with costs to be taxed by the clerk of the peace within five days." No formal order was ever drawn up in pursuance of this minute, but the clerk of the peace afterwards taxed the costs, and on his certificate, at a subsequent sittings of the Court of General Sessions, an order was applied for and obtained for the issue of a distress warrant for the amount of such costs.

Held, that, under ss. 880 (*e*) and 897 of the Criminal Code, it was necessary for a formal order to be drawn up in pursuance of the above mentioned minute, and that, therefore, there was no warrant or authority for the certificate of the clerk of the peace, or for the order of the Court of General

Sessions directing the distress warrant; and the same must be quashed.

Appeals from summary convictions and the costs payable in respect thereof are founded upon the statute law, and the provisions of the law regarding them in England and in this country are essentially different. In this country, in view of s. 880 (*e*) and (*f*) of the Criminal Code, the necessary formal order in pursuance of the above minute might be drawn up at a future sittings of the Court of General Sessions, which is a continuing Court, and the costs included therein *nunc pro tunc* if necessary; and the power to grant costs and determine what costs are just and reasonable is not with us, as it is in England, confined to the justices at the same General Sessions at which the appeal is heard.

Du Vernet, for the applicant.

J. H. Moss, for the respondent.

[Boyd, C., 11th April, 1900.

WARNE v. LONDON GUARANTEE AND ACCIDENT CO.

Accident insurance—"Immediate notice" of accident—Injury developing long afterwards.

This action was brought by the widow of Edward S. Warne to recover the sum of $5,000, upon an accident policy issued by the defendants in her favour, whereby they undertook that within ninety days after proof that the insured—the husband—had sustained bodily injuries effected through external violent and accidental means, and that such injuries alone and independently of all other causes had occasioned death, within ninety days from the sustaining of such injuries, the company should pay the principal sum to the plaintiff.

The husband was injured on the 10th December, 1897, and died on the 5th March, 1898.

Among other defences, the defendants set up that they had not received immediate notice of the accident, as required by a clause of the policy set out below, and at the trial before

BOYD, C., without a jury, at Toronto, the defendants sought to have the action dismissed upon this ground.

E. F. B. Johnston, Q.C., *J. R. Roaf*, and *H. G. Tucker*, for the plaintiff.

Wallace Nesbitt, Q.C., and *J. H. Denton*, for the defendants.

One of the cases referred to, very similar to this, was *People's Mutual Accident Assurance Co.* v. *Smith*, 126 Pa. St. 307.

BOYD, C.—I do not think I should interfere with this case on the question of notice. I think all notice was given justified by the statute or required by the policy. The third condition of the policy says:—"In the event of any injury covered by this policy, immediate notice shall be given in writing addressed to the office of the chief agent of this company for the Dominion of Canada, stating full name, occupation, and address of the insured, and the nature and extent of the injury; and failure to give such notice shall invalidate all claims, and within 7 months from the happening of such accident the claims accruing under this policy shall be waived and forfeited to the company."

Now this man met with the accident on Friday the 10th December. He stayed at home till Tuesday, when he went to work and remained away till the following Thursday. Then he apparently did not recover as well as he thought he should, and saw Dr. Dumble, who examined him and allayed any apprehension that may have arisen in the mind of his wife or himself. Dr. Dumble tells him that there is nothing seriously wrong and that the best thing he can do is to go about his work. Dr. Dumble was called in on the 16th December. He stayed at home till the 3rd January. During the Christmas holidays Dr. Dumble is again consulted, and he tells him that he may as well go about his work, and he goes out and remains for more than a month and comes home on the 12th or 13th February, and then he finds that he is in a bad condition; and on the 14th Mrs. Warne gave notice to the company that her husband had met with an accident. But before that he had given notice to the company; it has been proved that on the 23rd December he and his wife had an interview

with Mr. Hubbard, the manager of the defendant company, and the husband told Hubbard that he had slipped and hurt himself, but that he had not "laid up on the policy"—the very thing is pointed out there. He felt that he was not justified in making any claim on the policy. He felt that no claim had accrued and believed that the accident was a trifling one. Mr. Hubbard replied: "All right; I will take a note of it." Surely a person acting as he did—who did not press his claim immediately after the accident had happened, because he apprehended no serious results, is not to be precluded from the benefits under the policy if he finds that in time serious results have developed. He could not foresee the future—could not tell what was going to happen—but when serious injury is suspected he promptly gives notice. The company had ample notice on the 14th February. On that day Mrs. Warne sees Mr. Sargeant of the Commercial Travellers' Association, and he was the agent for some purpose of the defendants—the person through whom the money was received for the premium on that policy. Mr. Sargeant passes her on to the defendant company. Mr. Hubbard is not there. Mr. Russell is, and she tells him that her husband had been suffering from an accident sustained on the 10th December. He said he would send up Dr. Nattrass that afternoon. She said she had two notices in her hand—one a notice to the company notifying them that her husband had met with an accident, and a certificate from Dr. Spence. She did not leave them. Mr. Russell told her that that was all that was necessary, and he acts on that notice by sending up Dr. Nattrass.

The injury contemplated by this policy is such an injury as disables from work, and when so disabled the insured gave prompt notice. It is a matter for trial as to whether the man died in consequence of this accident. I think it would be injudicious to interfere with the trial at this stage of the case, and I let the matter stand for trial.

[Subsequently a settlement was effected.]

[30TH APRIL, 1900.

BELL v. WILSON.

Costs—Slander—Verdict for $1.

Where, in an action of slander, the jury returned a verdict for the plaintiff for $1, the trial Judge refused to deprive the plaintiff of costs, his conduct not having been reprehensible, and the small verdict being explained by the condition of the defendant at the time the words were uttered.

A. C. Shaw, for the plaintiff.

Watson, Q.C., for the defendant.

[STREET, J., 15TH MARCH, 1900.

RYAN v. TOWN OF CARLETON PLACE.

Building contract—Erection of hall—Reference—Division of questions of law and fact—Advisability of—Non-proof of by-law—Waiver of—Amendment—Plans and specifications—Incorporation into contract.

On a reference of an action, it is inadvisable, unless the line between the questions of law and fact is clear and distinct, to divide up the reference by first directing the evidence to the question of legal liability, leaving the quantum of damages and all others matters to be afterwards disposed of.

An objection as to the non-proof of a by-law authorizing a contract by a municipality for the erection of a town and fire hall, raised for the first time at the close of a reference, in an action to recover a balance due under the contract, was overruled, where the contract was declared on and referred to in the statement of defence, and identified by the mayor on the application for the reference by the defendants, and made part of the defendants' material, and treated as the contract throughout the whole reference, and upon which large sums of money had been paid under by-laws passed therefor.

An application for leave to amend so as to set up such objection was also refused.

Plans and specifications—the latter being divided under the headings "notes," "conditions," and "specifications," all bound up together and forming one document—drawn up for the erection of the said buildings, and (on the execution of the contract) an indorsement, initialled by the contractor and mayor, made on the specifications, stating that they were those referred to in the contract, must be read together as constituting one entire contract.

Watson, Q.C., and *J. A. Allan*, for the defendants.

Aylesworth, Q.C., and *J. R. Lavell*, for the defendants.

IN CHAMBERS

[ARMOUR, C.J., 30TH APRIL, 1900.

GIRARDOT v. WELTON.

Costs—Counterclaim—Relief obtainable without cross-action—Set-off.

The counterclaim of a defendant, properly so-called, is a claim by the defendant for a relief which cannot be obtained by him in the action; and calling a claim made by the defendant a counterclaim cannot make it one.

The plaintiff claimed a declaration that his interest as a chargee upon land could not be sold under the power in the defendant's mortgage upon such land, and, in the alternative, that he was entitled to redeem the defendant. By her pleading in answer the defendant alleged certain facts justifying her right to exercise the power of sale, and "by way of counterclaim" claimed payment of her mortgage, sale or foreclosure, possession, costs, and damages. The action was at the trial dismissed with costs, and the counterclaim was also dismissed with costs, the defendant not desiring a foreclosure, which she was offered.

Held, that the relief claimed by the defendant was obtainable by her in the action brought against her, and was not the subject of a cross-action or counterclaim; and the only costs taxable by the plaintiff against the defendant were such costs as were occasioned to the plaintiff by reason of the claim made by the defendant, treating it as a claim properly

made in the action and dismissed; and such costs should be set off *pro tanto* against the defendant's costs of the dismissal of the action. The judgment dismissing the "counterclaim" with costs meant that such costs should be taxed as were appropriate to it in its true character.

Semble, that in this Province the law as to set-off is different from the English law, and here a set-off should not be treated as a counterclaim nor be pleaded as such.

F. E. Hodgins, for the plaintiff.

S. White, for the defendant.

In the General Sessions of the Peace for the County of Perth.

[BARRON, Co.J., 20TH DECEMBER, 1899.

REGINA v. WEIR.

Factories Act*—*Definition of "factory"*—*Number of persons employed*—*Reckoning employers.

An appeal by the defendants from a conviction by the police magistrate for the city of Stratford, under s. 19 of the Ontario Factories Act, R. S. O. c. 256, for unlawfully keeping premises within the precincts of which steam power was used to move or work machinery employed in the manufacture of bricks or tiles, so that the safety of persons employed upon the premises was in danger.

The question raised by the appeal was whether the defendants' premises came within the definition of a factory in s. 2 of the Act, having regard to the proviso "that where not more than five persons are employed in any place coming within the foregoing definition of a factory * * * the provisions of this Act shall not apply."

Seven persons were found upon the premises working upon or about the machinery, but three of these were the defendants themselves.

The 5th clause of the proviso to s. 2 prescribes the mode of estimating the number of persons employed.

By s. 6 (1), if a person is found in a factory, such person shall, until the contrary is proved, be deemed for the purposes of this Act to have been then employed in the factory.

G. G. McPherson, Q.C., for the appellants.

Mabee, Q.C., for the informant.

BARRON, Co. J.—Of the seven persons found upon the premises, the respondent seeks to make three liable; his information is against three of them, and the conviction itself is of three of them. I do not see how these three informed against and convicted can be both employers and employees at the same time within the Act. If they be employees, they would, if hurt themselves, be entitled to the benefits of the Act, and, as they are employers too, against whom would they bring their proceedings? They could not well inform on themselves, and thus, if employees, they would have no remedy. Again, if these three defendants, or any of them, are employees and not employers, then they should not be convicted as they have been, and the conviction is bad on that account, because it is not the employee who is liable, but the employer. Still again, if these three are employers and not employees, then three from seven leaves four, and there are not so many persons employed as the proviso requires.

If it could be maintained, however, that a man, for the purposes of the Act, may be an employee and yet liable as an employer, what becomes of the explanatory words in the 5th clause of the proviso giving the mode of estimating the persons employed? The mode there given surely excludes the defendants, who are sworn to be partners, and who, through and by one of themselves, engage and employ; they are not engaged and employed, but they engage and employ, and it is only those who are engaged and employed who are counted in making up the requisite statutory number.

I think, therefore, I must quash the conviction, but I do so without costs.

In the County Court of the County of York.

[MORSON, JUN. CO. J., 18TH APRIL, 1900.

TAIT v. JACKSON.

Fire—Setting out—Municipal by-law—Notice—Negligence—Onus—Contributory negligence.

A person who sets out fire upon his own land in a township without giving the notice to the owner or occupant of the adjoining property required by a township by-law, passed pursuant to R. S. O. c. 223, s. 542, s-s. 16, and imposing a penalty upon any person contravening the by-law, pursuant to s. 702, s-s. 1 (*b*), is not, by reason of the omission of such notice, liable for damage done to the adjoining property, without proof of negligence; but the failure to give notice is *prima facie* evidence of negligence, and puts the onus upon the defendant of the proof of no negligence.

Held, upon the evidence in this case, that the defendant had satisfied that onus as regards the property of the plaintiff first destroyed, the cause of which was the sudden rising of a high wind, which the defendant was not bound to anticipate, and which caused the smouldering fire to suddenly blaze up.

As to the property of the plaintiff subsequently destroyed, there was negligence on the part of the defendant, for he might have taken measures to control the fire after the destruction of the first property; but there was contributory negligence on the part of the plaintiff in not making any effort to remove his property from danger; and he could not, therefore, recover.

An action for setting out fire, tried without a jury. The facts are stated in the judgment.

J. B. Clarke, Q.C., for the plaintiff.

Du Vernet, for the defendant.

MORSON, JUN. CO. J.—This is an action brought by the plaintiff, a farmer in the township of Scarborough, in the county of York, to recover from the defendant, also a farmer of said township, the value of a quantity of firewood, cedar, and other timber, cut into logs and piled upon the public highway opposite the defendant's land, in two separate piles, called the north and south piles, the property of the plaintiff, which had, as was alleged, been destroyed by fire set out by the defendant for the purpose of clearing his land. The

plaintiff alleges that the fire was unlawful, as being contrary to the provisions of a certain by-law of the municipal corporation of the township of Scarborough, passed on the 16th December, 1890, and entitled a by-law to regulate the burning of brush, etc., and then in force; and he further alleges that the defendant did not use due care to prevent the fire spreading, but carelessly permitted it to spread and burn for a long time. The defendant admits the burning of the property of the plaintiff, but says that the fire was set out in the usual course of husbandry, and without carelessness or negligence on his part, and, if it escaped and did the damage complained of, it was through no negligence of his. He further alleges that the by-law has no application to this case, and that the plaintiff was not the owner or occupant of adjoining property within its meaning, and was not therefore entitled to notice. He also further alleges that the plaintiff was guilty of contributory negligence in not saving his property after knowledge and notification that it was in danger.

On the evidence, I have come to the conclusion that the defendant knew of the plaintiff's property being on the highway opposite his property; that the fire set out by him was set out in the early part of June in the ordinary course of husbandry; that no fire was set out by him in the month of July; that he reasonably and honestly thought the fire had been extinguished in June by the rain and by burning out; and that he was not aware of any fire or smoke upon his premises until the 30th July, the day on which the north pile was destroyed. It is quite clear, however, that in this he must have been mistaken, for there seems no reason to doubt that the fire had been smouldering from the time when the defendant thought it was out up to the 30th July, when it broke out again, but not to the knowledge of the defendant. I do not find any negligence on his part in not knowing of the smouldering, under the circumstances. On the 30th July, in consequence of a very high wind suddenly arising, it blazed up, and as a result the plaintiff's north pile was destroyed. About a week later the south pile was also destroyed, and during all that week the fire was burning to the knowledge of the defendant, who took no steps, so far as his evidence shows, to control it or put it out, and who was

aware that the south pile had not been removed out of danger. The plaintiff had knowledge that the fire was raging, as he termed it, all that week, and he, having his harvest to attend to—which he deemed the most important—took no steps to remove the south pile, which was destroyed. The defendant did not give the notice required by the by-law before setting the fire out. The plaintiff does not allege that there was any negligence in setting out the fire, which he admits was quite proper in the ordinary course of husbandry in the month of June. He does not show any particular act of negligence down to the 30th July. He only alleges that fire was set out on the 13th July, and that smoke was seen rising during the months of July and August. This, in itself, apart from the by-law, in my opinion, is not evidence of negligence. He does not state that the fire was not under control, or that there was any danger in it, or that it must have been smouldering. It might be, however, that the setting out of fire on the 13th July, a month which was very dry, is some evidence of negligence, but the defendant has answered this by shewing to my satisfaction that he did not set out any fire on that date.

Now, at common law it was the defendant's right to properly set out fire on his own land for the necessary purposes of husbandry, provided he or his servants managed it with due care, and if he did, and damage was nevertheless done, he was not responsible, on the ground that every man has a right to use his land in the way he thinks best, but in using fire, which is a dangerous substance, he must use proper precautions to prevent it extending to his neighbours. He must exercise the care and diligence which a prudent man would observe in his own affairs and which a prudent and conscientious man will observe as to the interests of his neighbours, but this amount of care varies of course according to circumstances: *Dean* v. *McCarty*, 2 U. C. R. 448; *Furlong* v. *Carroll*, 7 A. R. 145.

The plaintiff, however, while admitting this to be the law, and contending that the defendant was negligent, further contends that, because of the non-observance of the by-law in not giving notice, the setting out of the fire, which was otherwise lawful, was unlawful, and therefore the defendant

is liable in any event, whether negligent or not, and refers to *Fletcher* v. *Rylands*, L. R. 1 Ex. 265, in support of this contention. This case decides that one who, for his own purposes, brings upon his land and collects and keeps there anything likely to do mischief, if it escapes, is prima facie answerable for all the damage which is the natural consequence of its escape.

By the Municipal Act, R. S. O. c. 223, s. 542, s.-s. 16, by-laws may be passed by the councils of municipalities "for regulating the times during which stumps, wood, logs, trees, brush, straw, shavings, or refuse, may be set on fire or burned in the open air, and for prescribing precautions to be observed during such times; and for preventing such fires from being kindled at other times:" and by s. 702, s.-s. 1 (*b*), the right to impose penalties is given for violation of any of these by-laws.

In pursuance of this statutory power, the municipal council of the township of Scarborough passed the by-law in question, No. 516, which enacts: "(1) That from and after the passing of this by-law, it shall not be lawful for any person or persons to set on fire or burn any stumps, wood, logs, trees, brush, straw, shavings, or other refuse in the open air within the township of Scarborough, at any time between the 1st day of July and the 15th day of September in any year; nor at any other time or times during the year, until after eight days' notice has been given to the owner or occupant of the adjoining property which might be injured thereby, of the intention of any person to set fire to or burn such material.

"(2) That any person contravening the provisions of this by-law shall be liable, upon conviction, to a fine of not less than two dollars nor more than fifty dollars, to be recovered before any justice of the peace for the county of York, to be collected by distress and sale of the goods and chattels of the offender," etc., etc.

By this s. 702, s.-s. 1 (*b*), no power is given to municipalities to interfere with the common law rights of parties who come within the by-laws, either to increase or lessen them, or to take them away altogether; only the power to impose a penalty and nothing more. If the Legislature intended that

the non-observance of the by-law took away the common law right of defence of no negligence, as contended for by Mr. Clarke, they would have expressly said so; not having done so, it is not for me to do so. It is a well-known rule, applicable to all by-laws, that they must be reasonably clear and unequivocal in their language in order to vary or take away common law rights, and, in my opinion, this by-law does neither. It only says, you must not set out fire in certain months of the year without first giving notice, and if you do you must pay the penalty imposed by it. It cannot make the setting out unlawful without the notice; if it did I think it would be clearly *ultra vires*, for *power is only given to regulate* the times during which fire may be set out, not to prevent it altogether. It only adds to what is a lawful act in setting out for the purpose of husbandry, the condition of first giving notice, under a penalty for its omission.

From a perusal of the case of *Lamb* v. *Sloan*, 94 N. C. 534, it appears that the Legislature of that State, at all events, thought it necessary to enact specially, in addition to the pecuniary penalty, that any one violating the statute should be liable to any person injured in an action. The section of that Act, which is very similar to this by-law, is as follows:—

"No person shall set fire to any woods except it be his own property, nor in that case without first giving notice in writing to all persons owning lands adjoining to the woodlands intended to be fired, at least two days before the firing of such woods, and also take effectual care to extinguish such fire before it shall reach any vacant or patented lands near to or adjoining the lands so fired.

"Every person wilfully offending against the preceding section, shall for such offence forfeit and pay to any person who shall sue for the same, the sum of $50, and be *liable to any one injured in an action*, and shall moreover be guilty of a misdemeanour."

The action was brought under the statute against the defendant, who set out the fire without giving the notice. The learned Judge in his judgment, amongst other things, says: "Having set fire to his woods, without having given the plaintiff at least two days' notice thereof, he made himself

liable for such damages as the latter sustained by the spread of the fire to and upon his adjoining woodland. Reasonable diligence on the part of the defendant in his efforts to keep the fire under control would not relieve him from this cause of action. He made himself responsible at all events for the harm his fire did the plaintiff. The very purpose of the statute was to give the plaintiff a right of action in which the defendant could not defend himself successfully by showing reasonable care and diligence on his part, as he might do if the plaintiff had sued for a breach of his common law right; otherwise the statutory right would be nugatory."

In my opinion, then, the by-law does not have the effect contended for by Mr. Clarke, and, coming to this conclusion, it becomes unnecessary for me to consider the point raised by the defendant, that the plaintiff was not the owner of adjoining property within the meaning of the by-law so as to entitle him to notice. I think, however, that the only effect the failure to give notice has, is that it is sufficient evidence of negligence so as to make it unnecessary for the plaintiff to prove it, which he otherwise would have to do, and puts the onus upon the defendant of the proof of no negligence. I have not been referred to any cases directly on the point, and can find none, but in notes to s. 489, s.-s. 24, in Harrison's Municipal Manual, I find the following:—"The kindling of a fire in a municipality where such a by-law exists at a time other than prescribed by the by-law, or in disregard of the precautions made necessary by the by-law, would be strong, if not conclusive, evidence of negligence." It is to be noticed that it is not said that the defendant would be liable at all events and prevented from setting up his common law defence of having used due care and caution. It seems to me if this were the effect of the non-observance of the by-law, in addition to being evidence of negligence, it would have been referred to by the late learned author, who would not have overlooked a point so important. The defendant, then, in my opinion, for the reasons I have stated, is not, by reason of his failure to give the notice under the by-law, brought within the principal of *Fletcher* v. *Rylands*, and is, therefore, entitled to defend himself by satisfying the onus that is upon him, as a result of his failure to give notice and show that the

destruction of the plaintiff's property was not the result of his, the defendant's, negligence, so far as the north pile is concerned. I think he has satisfied this onus.

The conclusions, on the evidence, that I have come to, compel me to find that there was no negligence on the part of the defendant, and that the *causa causans* was the sudden rising of the very high wind, which the defendant was not bound to anticipate, and which caused the smouldering fire to suddenly blaze up to the extent it did, carrying it across to the plaintiff's north pile and destroying it. Under these circumstances, the defendant is not liable: *Buchanan* v. *Young*, 23 C. P. 101.

As to the south pile, I think I must find that the defendant was negligent. Having the knowledge that on the 30th July there were two acres of fire burning in the morning and ten acres at night; that it was a large and fierce fire owing to the high wind, and had already burned the north pile; that the south pile was very near the fire across the highway; that the fire was still raging in the evening of that day when he left it, and went home—it was his duty to have taken some steps, at least, to control it or put it out, and not leave it as he did without ever having gone near it for one week, and until it burned the south pile. Knowing, as he did, that the north pile was burned by a fire not so large in extent, he should have been careful to see that the south pile did not share a similar fate. Remaining inactive as he did, under the circumstances, in my opinion, is negligence. It may have been that the fire was too large in extent for him to control, had he made an effort to do so, and that the south pile would have been burned in any event unless removed, but this does not prevent his inactivity being negligence all the same. I think, however, notwithstanding the negligence of the defendant, I must find there was contributory negligence on the part of the plaintiff in not making any effort to remove the south pile from danger, which might have saved it from destruction. He knew on the 30th July of the extent of the fire as well as the defendant, and he says there was no doubt it was beyond control in the morning, and that there were ten acres blazing in the afternoon. He knew the defendant was making no effort to control it, and they both left and

went home, apparently taking chances. He knew that the north pile had been burned by a fire not so large in extent, and which had sprung up suddenly, and which was no nearer to the north pile than this fire was to the south pile, when he left it on the evening of the 30th July and went home, the same as the defendant, without making any efforts to remove it out of danger, though he knew, or should have known, it was in dangerous proximity to the fire. It seems to me he cannot excuse this by saying, as he did, that he thought it was not in danger, and that, even if it was, he had to attend to his harvest and could not attend to both. In doing as he did, he was taking chances and not acting as a reasonable and prudent man would under the circumstances, for the fire was of such a nature as should have impressed him with a sense of its danger. He should not, if he did, have assumed that it was out. He said in his examination for discovery that he had plenty of time to remove the timber, if he saw fit to do so, if he had given his attention to it, but that it was in the middle of harvest. He said that he knew a bush fire was raging more or less; that it had died down considerably; and that he was keeping watch on it, but thought it safe enough. I am satisfied he could at least have removed the south pile to a place of safety had he used reasonable exertions to do it, as he was bound to do. Not having done so, he is as much to blame for its destruction as the defendant.

For the reasons then that I have stated, the plaintiff cannot, in my opinion, recover for either the north or south pile, and I therefore dismiss his action with costs.

In the Third Division Court in the County of Elgin.

[HUGHES, Co.J., DECEMBER, 1899.

DUNCOMBE v. BURKE.

Use and occupation—Foreign consul—Personal liability for office rent.

The defendant, a foreign consul, was personally sued for use and occupation of certain rooms which had been used by him and his predecessor as the consulate office. When the defendant assumed office, a

lease from the plaintiff to the former consul was current, but was not assigned to the defendant. The rent had in fact been paid by the foreign Government through the former consul, and the lease had been submitted to the Government and approved by it, both to the knowledge of the plaintiff. The plaintiff did not demise or attempt to demise to the defendant.

***Held*, that the defendant was not liable.**

An action for use and occupation of certain rooms in the city of St. Thomas. The defendant was the consul for the United States of America at St. Thomas. His predecessor in that office, one Willis, shortly before he was removed, took a lease of the rooms from the plaintiff to himself, Willis, his heirs, executors, administrators, and assigns. The rooms had been used by Willis solely as the consulate office, and when he left the defendant continued to use and occupy them as such office; but the unexpired portion of the term was not assigned to the defendant. It was admitted that the occupation by the defendant was for the public use of the United States Government, and that the lease to Willis had been submitted by him to the consular department at Washington and approved on his recommendation, to the knowledge of the plaintiff.

W. B. Doherty, for the plaintiff.

Donahue, Q.C., for the defendant.

HUGHES, CO. J.—According to equity and good conscience, the plaintiff has no right to recover in this action, because:—

1. There was no demise to the defendant, nor was the relation of landlord and tenant established between the plaintiff and defendant.

2. There had been two leases made to the former consul for different terms; the last one, for four years, was made on the expiry by effluxion of time of the first demise, just before Mr. Willis was leaving his office on his expected change of appointment.

3. Mr. Willis, when he left the consulate, neither surrendered to the plaintiff, nor assigned the unexpired term, nor did he sublet the premises to the defendant; nor did the defendant attorn to the plaintiff or become the sub-tenant

of Mr. Willis. He could not become the tenant of the plaintiff because there was an outstanding term in Willis.

4. The defendant appears to have come to the consulate in his official capacity, and to the occupation of the demised premises as the premises for which the United States Government was paying the rent. Mr. Willis went out of occupation, and the defendant, by the act of his Government, went in. He replaced Mr. Willis on the removal of that officer, and took possession of the office and its archives, as the representative or servant of that Government, and as exercising their rights and not his own.

5. The rent was paid, for the public uses and services of the consulate, first by Mr. Willis out of money supplied as contingencies by his Government, and next by the defendant, and not for the private use or service of either of them, and not as in the discharge of a personal debt or obligation.

6. Shortly before Mr. Willis left the consulate, in the full anticipation of his leaving, the plaintiff made, and Mr. Willis took, as I have already said, in his own name, a second formal written demise of the premises to himself, for four years; whereby, technically speaking, a term was created in himself, "his heirs, executors, administrators, and assigns." It is quite true he was described as "United States consul," which I suppose may be put down as mere matter of identification, for there was no mention made that the demise was for the uses and purposes of the consulate, or as an office for the benefit of the United States Government, which being the case, the only conclusion which must follow is, that Mr. Willis was, and still is, the tenant of the plaintiff, and if so, then the plaintiff cannot without a surrender or an assignment of the term or a sub-tenancy, have any right of action against the defendant, and there was neither of these.

7. Coming down to the actuality of the transaction, although Mr. Willis personally covenanted for the payment of the rent, it was well understood by the plaintiff, as he himself acknowledged, in his evidence, that the rent was to come from the United States Government, and not from Mr. Willis personally. The demise made to Mr. Willis, in form, was actually for the use and occupation of the consulate.

8. Were it otherwise the question would arise: Why was the lease made out in triplicate and a copy sent to the authorities at Washington, for their approval, with the knowledge and consent of the plaintiff and Mr. Willis?

9. Why was that approval necessary, if Mr. Willis or the consul for the time being was to be personally responsible for the payment of the rent?

10. Was it not well known to the plaintiff that the office was rented for the public use and purposes of the consulate, and not for the private use and occupation or purposes of the individual consul?

11. Mr. Willis entered and occupied the premises in his public capacity, as the officer and servant of the Government, who were to pay the rent, and when that service was terminated, the defendant, in his consular and official capacity, took possession of the office as Mr. Willis's successor, but that did not make him the tenant of the plaintiff.

12. The receipts given by the plaintiff, taken together with the other evidence, plainly shew to my mind, that the plaintiff was all the time looking, in fact, to the United States Government, as the *source* from which he was to receive the payment of his rent.

13. The extending the term by a second lease for four years—beyond Mr. Willis's probable continuance in office (which it was well known would be subject to change)—gives an unfavourable colouring to the transaction, and was no doubt done to secure payment of a rental to the plaintiff beyond Mr. Willis's capacity for dealing with the subject. Whether it was a cunning device or not, to which Mr. Willis improperly lent himself, as was suggested by counsel for the defendant, it is unnecessary for me to decide. It is sufficient for me to hold and determine that the plaintiff had not *three* tenants, nor *two* tenants—but only *one*, and that one was the source of the supply to which the plaintiff looked for his rent, and who by its officer was in the use and occupation of the premises, unless Mr. Willis is still the tenant, according to the terms of the lease.

14. When Mr. Willis left the office, the Government of the United States was in lawful possession of the demised premises, as it had the right, because it had paid the rent (as

shewn by the plaintiff's receipts) and the use and occupation of the office by its consul was for the public uses of the consulate, and it was their possession and not the possession of the officer in charge, because he might have been turned out of his position as consul at any moment, by the exercise of the pleasure and will of his Government, and they might have placed any other agent or person in his place, without committing trespass.

15. The payments made by the consul, of the quarterly rents, were from funds supplied as contingencies of the consulate; it did not matter by whose cheques they were paid; the receipts taken from the plaintiff fully explain that the defendant was the mere *channel* through whom the rent was paid, and point out also the *source* of the supply, as compensation for the use and occupation of the premises.

In the First Division Court in the County of York.

[MORSON, JUN. Co. J., 5TH MAY, 1900.

LAW SOCIETY OF UPPER CANADA v. CLARKE.

Solicitor — Practising—Law Society—Annual fees—Right to recover by action—Bond.

This was an action brought to recover $17, fees for annual certificates, due Michaelmas Term, 1899, and $6, fines on the same, against the defendant, who had been a practising barrister and solicitor, but who had not practised or taken out his annual certificates for some years past.

Walter Read, for the plaintiffs.

S. R. Clarke, the defendant, in person.

MORSON, JUN. Co. J.—The Law Society allege that by reason of certain proceedings taken by the defendant in January last in an action of *Jackson* v. *Clark* in this Court and in the High Court of Justice, upon an application for a mandamus, the defendant was practising as a solicitor, and therefore liable to pay the annual fees for 1899.

Written admissions were put in by which the defendant admitted that these proceedings were taken in the High Court of Justice; that he was a duly enrolled barrister and solicitor; and that he had not paid any fees for his annual certificate for the year commencing Michaelmas Term, 1899. He gave evidence on his own behalf, and also called Mr. Jackson, the plaintiff in the Division Court action, to show that he was using Jackson's name as plaintiff instead of his own, and that he had no claim and made none for costs or fees against Jackson, and that he never intended to charge any, and, therefore, was not practising as a solicitor. I am unable to give effect to this contention. He signed his name to the proceedings, and appeared in Court as counsel in the case, and, in my opinion, this constitutes practising, and he cannot now be heard to excuse himself by saying he was in reality a plaintiff, and not solicitor or counsel. I must, therefore, find that he was practising, as complained of by the Law Society.

The defendant further contends that, even if this be so, he is not liable for the fees for 1899, and further that the society have no power to sue for them. Mr. Read, for the society, abandons the claim to the fines. By s. 52 of the Law Society Act, R. S. O. c. 172, power is given the Law Society to fix the annual fee and fines payable by barristers and solicitors, and by Rule 232 of their Rules, this fee was fixed at $2 for barristers and $15 for solicitors, or $17, the amount now claimed. By s. 43, they may from time to time make all necessary rules, regulations, and by-laws in regard to the admission of solicitors to practice, and all other matters relating to the discipline and practice of such solicitors. By s. 44, they have the power to suspend or expel solicitors in case of misconduct and to debar them from practising. By s. 46, a solicitor can be struck off the rolls by an order of the High Court. By s.-s. 1 of s. 19 of the Act respecting Solicitors, R. S. O. c. 174, every practising solicitor shall take out his annual certificate before the last day of Michaelmas Term, stating that he is a practising solicitor in the High Court. By s.-s. 3 of s. 19, upon payment of all fees and dues payable by such solicitor, the secretary shall issue a certificate to him. By s. 22, a solicitor omitting to take out his annual

certificate in Michaelmas Term, is liable to certain fines to be paid when he does take it out. By s. 23, if a solicitor practises in the High Court without such certificate, he shall forfeit to the Law Society a sum of $40, to be recovered in the High Court. By s. 24 he is liable to be suspended from practice for not less than three nor more than six months, and to continue so suspended until the fee upon the certificate for the year in which he so practised without certificate is, together with the penalty of $40, paid to the Law Society.

Now, it is quite clear that by these statutes and Rules, the taking out of the certificate is voluntary and not compulsory, and that the practising without it only subjects the solicitor to the penalties and consequences imposed by them. If he chooses to practise, even once, as this defendant has, without first complying with the law and the rules of the society, in my opinion, he only makes himself liable for the penalties and forfeitures already mentioned, and not for the payment of the fees for the annual certificate for the year in which he has practised, as contended for by the society. He is not compelled by either the statute or Rules to take out his certificate unless he so desires, and if he does not do so, how can he be held liable for the fees? The plaintiffs cannot compel the defendant to accept the certificate for 1899, and he, not having accepted it, cannot now be asked to pay the fees on it. . If he had to do so, he would be paying for something he never received and for something never tendered him, and for this reason, apart from any other, it seems to me the society cannot recover. If he does desire to take out his certificate, he cannot do so without first paying the fee, but if the society chose to waive their right to its being first paid and to give him the certificate, he would of course be compelled to pay for it, for, though no express power is given the society to sue for the fee, such power would of necessity be, under the circumstances, implied.

The Law Society contend further that they can recover under the bond given by the defendant when he entered as a student-at-law. In my opinion they cannot. The bond is conditioned that he will well and truly pay or cause to be paid all such fees and dues of what nature or kind soever as now are due or payable by or from him to the said society or

which shall or may hereafter become due or payable by or from him to the society, or under any rule or regulation or by-law or regulation to be passed by the benchers of the said society in convocation. This condition cannot include a fee which is not due or payable, and, as I have already stated, the defendant is not liable for this fee. He is only liable if he takes out the certificate, and not having done so, the fee is not due, and therefore not within the terms of the bond.

For the reasons, then, that I have stated, the society cannot recover. I therefore give judgment for the defendant, but, under the circumstances, without costs.

MANITOBA.

In the Queen's Bench.

[KILLAM, C.J., 23RD APRIL, 1900.

SHRIMPTON v. CITY OF WINNIPEG.

Interim injunction—Costs—Municipal corporation—Purchase of land for hay market—Subsequent arrangement.

This action was brought by a ratepayer of the city of Winnipeg for an injunction restraining the city corporation from entering into a certain agreement for the lease and purchase of land for a hay market.

In 1898 the lessor, Cummins, leased the land to the city for ten years; subsequently he offered to cancel the lease and make a new one on certain terms; and, on receipt of the amounts named in the lease, he proposed to convey the land to the city in fee.

This offer was accepted, and the matter referred to the city solicitors; after it had been so referred the solicitors were advised that certain ratepayers objected to the proposed arrangement and intended to attack the transaction as illegal. Cummins then wrote the solicitors a letter with an alteration of the terms proposed. After the submission of this proposal by Cummins, and before its consideration by the city

council, this action was commenced, and a motion made for an interlocutory injunction. This motion was several times adjourned, and while it was pending Cummins's latest proposal was submitted to the council and rejected.

After the last adjournment, and before the motion finally came on for hearing, a new arrangement was entered into, so far varying the original proposition that the injunction was not pressed for, and, by agreement, the only question submitted was that of the disposition to be made of the costs of the action and motion.

The plaintiff contended that he was entitled to an injunction when the action was brought, and up to the time of the last enlargement of the motion, and should be allowed his costs. For the defendants it was argued that an intention to enter into an illegal transaction did not sufficiently appear; that the plaintiff sought to enjoin the defendants from entering into a contract which, upon his own showing, would not be binding, and that the plaintiff's interests were not affected in such a way as to warrant him in suing.

Held, that the defendants should pay the costs of the action and the motion. "If an arrangement proposed is illegal any member of the company may dissent from it and has a right to appeal to the Court to be protected against its effects:" *Hoole* v. *Great Western R. W. Co.*, L. R. 3 Ch. 268; Dillon on Municipal Corporations, s. 910; *Smith* v. *Township of Raleigh*, 3 O. R. 305; *Wallace* v. *Town of Orangeville*, 5 O. R. 37.

Tupper, Q.C., and *Phippen*, for the plaintiff.

Ewart, Q.C., and *I. Campbell*, Q.C., for the defendant corporation.

A. J. Andrews, for the defendant Cummins.

[BAIN, J., 19TH MARCH, 1900.

ST. GERMAIN v. CHARETTE.

Seduction—55 V. c. 43—Female seduced illegitimate—Suit by mother's husband.

Action for seduction. The statement of claim was filed

by Joachin St. Germain, who alleged that he had suffered damage from the seduction by the defendant, of Marie Nault, the stepdaughter and servant of the plaintiff. The evidence at the trial showed that Marie Nault was illegitimate.

Howell, Q.C., and *Dubuc*, for the defendant, moved for a nonsuit, on the ground, amongst others, that when the female seduced is illegitimate, the Act respecting the action of seduction, 55 V. c. 43 (Man.), does not apply. That Act provides that "the father, or in case of his death, the mother (whether she remains a widow or remarries), of any unmarried female who has been seduced, and for whose seduction the father or mother could maintain an action, in case such unmarried female were at the time dwelling under his or her protection, may maintain an action for the seduction, notwithstanding such unmarried female was, at the time of her seduction, serving or residing with another person, upon hire or otherwise." They cited *Hicks* v. *Ross*, 25 U. C. R. 50. They also contended that the mother of the girl seduced cannot become a widow or re-marry, if she never was married previously, and that the plaintiff was not a stepfather, so *Waters* v. *Powers*, 29 U. C. R. 336, did not apply.

Wilson and *Elliott*, for the plaintiff, cited *Rex* v. *Hodnett*, 1 T. R. 96.

Held, that s. 1 of the Act did not apply to the case of an illegitimate woman, so the present action was not maintainable. The plaintiff was therefore nonsuit.

BRITISH COLUMBIA.

In the Supreme Court.

[THE JUSTICES IN BANCO, 9TH FEBRUARY, 1900.

REGINA v. PETRIE.

Criminal law—Common gaming-house—Criminal Code, s. 196.

The prisoner was lessee of a room to which the public had free access, and in which several people congregated and

played a game called "black jack." There was no constant dealer, and the lessee got no benefit. The dealer (who is chosen on commencing by cutting the cards) has an advantage, and as a rule can keep the deal five or six minutes.

The prisoner was convicted, under s. 196 of the Code, of keeping a common gaming-house, and the Court of Criminal Appeal confirmed the conviction, holding that, as the dealer (banker) had an advantage over the other players, the game came under the provisions of s. 196.

Wilson, Q.C., and *Brydone-Jack*, for the Crown.

Davis, Q.C., for the prisoner.

[MARTIN, J., 9TH MARCH, 1900.

RUSSELL v. SAUNDERS.

Affidavit—Cross-examination on—Rules 385, 429.

Motion for injunction. Counsel for the defendant objected to the plaintiff's affidavit being read, as he had served notice asking that the plaintiff be produced for cross-examination on his affidavit, but the plaintiff had objected to being cross-examined.

Held, that Rules 385 and 429, taken together, compel the production for cross-examination of a deponent on his affidavit, if required by the opposite party, before such affidavit can be used.

Duff, for the defendant.

Harold Robertson, for the plaintiff.

[28TH MARCH, 1900.

THURSTON v. TATTERSALL.

County Court action—Transfer to Supreme Court—Extension of claim.

The plaintiff sued in a County Court for $950, and the action was transferred to the Supreme Court under s. 69 of

the County Courts Act, the order providing that a statement of claim should be delivered, etc. The statement of claim when delivered claimed $3,000.

Held, at the trial, giving plaintiff judgment for the full amount, that when an action has been so transferred, the plaintiff can extend his claim beyond the sum he originally claimed in the County Court.

Wilson, Q.C., and *F. Elliott*, for the plaintiff.

Macdonald, Q.C., and *Johnson*, for the defendant.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[OSLER, J.A., 15TH MAY, 1900.

APPLEBY v. TURNER.

Leave to appeal—Order setting aside judgment—Grounds of—Plausible attack—Statement of claim—Service by posting—Irregularity—Delay—Discretion.

A Divisional Court of the High Court having set aside a judgment signed by the plaintiffs for default of defence in an action on a bond (*ante* 209), upon two grounds, viz., (1) that a motion for judgment was necessary, and (2) that the statement of claim had never been legally served upon the defendants, the posting up thereof in the office not being service because of the omission to file an affidavit of service of the writ of summons before doing so:—

Held, that leave to appeal should not be granted unless the plaintiffs could make a plausible attack upon both grounds, for if only one were demolished, the other would support the judgment, and leave to appeal is not given merely to settle a point of practice the decision of which would not affect the judgment complained of.

And in this case the service of the statement of claim could not be supported, having regard to Rule 574, and it was in the discretion of the Court below to give effect to the objection to its regularity, notwithstanding the defendants' delay in moving against the judgment.

W. E. Middleton, for the plaintiffs.

Hislop, for the defendants.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACMAHON, J., 10TH MAY, 1900.

SAWYER v. ROBERTSON.

Jury notice—Exclusive jurisdiction of Chancery—R. S. O. c. 51, s. 103—Legal and equitable issues—Rule 551.

The plaintiffs' claim was to enforce a charge against the defendant's lands and for a personal order or judgment for immediate payment of the sum for which they asserted the charge.

Held, not such an action as would have been, before the Administration of Justice Act of 1873, within the exclusive jurisdiction of the Court of Chancery, within s. 103 of the Judicature Act, R. S. O. c. 51.

There being, therefore, legal and equitable issues raised, and notice for a jury given, Rule 551 applied, and the action should be entered for trial at a jury sittings.

Kirwan Martin, for the plaintiffs.

Glyn Osler, for the defendant.

[14TH MAY, 1900.

WHITEWOOD v. WHITEWOOD.

Payment into Court—Infant's fund—Trustee—Discretion—Costs—Interlocutory motion—Affidavits.

The defendant, having in her hands a fund to the benefit of which the plaintiff, an infant, was entitled, asserted that, by the terms of the trust upon which she held it, she had a discretion as to the application of it for the benefit of the plaintiff. She nevertheless paid the money into a bank to her own credit as trustee for the plaintiff, and agreed that she would not use it except for his benefit, and would pay it to him at majority.

Held, that the defendant was a mere trustee for the plaintiff without the discretion which she contended for; and a summary order, made before delivery of statement of claim

in an action to recover the fund and for an injunction, requiring the defendant to pay the fund into Court, and thereupon perpetually staying the action, was affirmed.

In re Humphries, Mortimer v. *Humphries,* 18 P. R. 289, 18 Occ. N. 382, approved.

Where an interlocutory motion was dismissed upon preliminary objections:—

Held, that the taxing officer had a discretion to disallow to the party opposing it the costs of affidavits filed in answer to it.

Eyre, for the plaintiff.

Carey, for the defendant.

[BOYD, C., ROBERTSON, J., MEREDITH, J., 14TH MAY, 1900.

CRAIG v. CROMWELL.

Mechanics' lien—"Notice in writing" to owner—Letter—R. S. O. c. 153, s. 11, s.-s. 2.

The claimants of a mechanics' lien for materials wrote to the owner a letter asking him, when making a payment to the contractor "on the Lisgar street buildings"—the property on which the lien was asserted—to "see that a cheque for at least $400 is made payable to us on account of brick delivered, as our account is considerably over $700, and we shall be obliged to register a lien if a payment is not made to-day."

Held, MEREDITH, J., dissenting, a sufficient "notice in writing" of their lien, under s.-s. 2 of s. 11 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. c. 153.

Thomson, Q.C., and *R. B. Matheson,* for the claimants.

Arnoldi, Q.C., for the owner.

WAKEFIELD v. WAKEFIELD.

Tenant for life—Renewal of lease—Carrying on business on premises—Profits—Account.

A widow was entitled under her husband's will to the use and enjoyment of all his property during her life. It was

conceded that she was entitled to the enjoyment in specie of the personal estate. The testator owned a brick-field on leasehold land, which was a going concern at the time of his death. This and the plant in connection therewith the tenant for life took possession of, and went on with the working of it. She put other assets of the estate into this business and extended it, and when she died it was still a going concern. At the expiration of the term of her husband's lease, she obtained a new one, covering a larger area of land.

Held, MEREDITH, J., dissenting, that the widow, having elected to carry on the business on these premises, did so for the ultimate benefit of the estate. She was entitled to all the income, earnings, and profits derivable therefrom each year, in so far as she applied them to the maintenance of the family, or in the acquisition of other property, or in the paying off of mortgages; but whatever profits went into the business to increase it, and whatever plant, stock, and belongings of the business remained on the premises or elsewhere at her death, became the property of the husband's estate.

An account against her executor was directed, and the scope of the inquiry defined.

Murphy, Q.C., and *R. G. Smyth*, for the plaintiffs.

Coatsworth and *F. E. Hodgins*, for the defendant T. Wakefield.

A. J. Boyd, for the infant defendants.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 17th MAY, 1900.

LARKIN v. LARKIN.

Mechanics' liens—Parties to action—Mortgagee—Time—Notice of trial—Placing materials on land—Increased value—Conversion—Damages.

In order to bind the interest of a mortgagee in an action to enforce a mechanics' or wage-earners' lien under R. S. O. c. 153, such a mortgagee must be made a party to the action within the 90 days mentioned in s. 24, s.-s. 1; otherwise the lien absolutely ceases to exist as against such interest.

Bank of Montreal v. *Haffner*, 10 A. R. 529, and *Cole* v. *Hall*, 13 P. R. 100, followed.

Wide and comprehensive as is the language used in ss. 35 and 36 of the Act, it was not intended to make so radical a change in the procedure as to enable a plaintiff, who has not constituted his action with the necessary parties, and cannot make them parties after judgment on a reference as to incumbrances, to bind them by serving them with a notice of trial under those sections.

Held, also, MEREDITH, C.J., dissenting, that such a lien attaches to the increased value, if any, in priority to a mortgage, as soon as lumber, which is to be used in the construction of a building upon the land, is placed upon the land, and before the lumber is incorporated into the building.

And where lumber, paid for by the mortgagee out of advances under his mortgage, was removed by the owner to a mill to be planed, and the mill-owner sold it to satisfy his charges and paid the balance to the mortgagee:—

Held, that at most the act of the mortgagee amounted to conversion, and the statute provides no machinery enabling the Court to assess damages against any one in such a case, so as to give lien-holders the benefit of the amount of such damages for division among them.

J. G. Farmer, for the defendants Hersee.

Kirwan Martin, for the plaintiff.

[BOYD C., FERGUSON J., ROBERTSON J., 26th May, 1900

GIRARDOT v. WELTON.

Costs—Counterclaim—Relief obtainable without cross-action—Set-off—Rules 1164, 1165—Order of revivor.

Decision of ARMOUR, C.J., *ante* p. 231, as to the costs taxable by the plaintiff upon a judgment dismissing a so-called counterclaim, affirmed.

Held, also, that such costs were interlocutory costs within the meaning of Rule 1165; and, if not, that they were costs falling within Rule 1164, and subject to the discretion of the taxing officer in setting them off against the defendant's costs of the action.

Held, also, that costs of an order of revivor obtained by the plaintiff after judgment in order to tax his costs should be taxed to him and added to his other costs and set off against the defendant's costs.

F. E. Hodgins, for the plaintiff.

S. White, for the defendant Welton.

[BOYD, C., 15TH MARCH, 1900.

MOSHIER v. KEENAN.

Principal and agent—Possession of goods—"Intrusted"—R. S. O. c. 150—Sale by agent—Recovery of price from purchaser—Estoppel.

A limited meaning is to be given to the term "agent" as used in R. S. O. c. 150. It is to be restricted to mercantile agents, and does not include every one who may act and who has possession of the property. An agent within the Act must be one who is *intrusted* with the possession as agent for sale in a mercantile transaction, or for a purpose connected with the sale of the property.

Held, that an agent who had obtained possession of certain lumber from the master of a vessel without authority from the owner, was not *intrusted* with the possession, and the owner was entitled to recover the price against the purchaser, although the latter had paid the agent.

J. M. Kilbourn, for the plaintiff.

W. J. Hatton, for the defendants.

[5TH MAY, 1900.

LOGAN v. HERRING.

Costs—Will—Action to set aside—Failure of—Dismissal without costs—Costs out of estate—Administration.

In an action to set aside a will for undue influence by two of the defendants, one of whom was the executor, the attack failed, and the action was dismissed, but without costs as to these two defendants, there being circumstances which might, unexplained, appear to be suspicious.

The other defendants, two pecuniary legatees under the attacked will, and a religious society to whom land was devised by it, submitted their rights to the Court, but appeared by counsel at the trial, and joined in resisting the plaintiffs' claim.

Held, that these defendants were in the position of "interveners" under the English procedure, and were not entitled to costs out of the estate.

Held, also, that they were not entitled to costs against the plaintiffs.

Semble, that they would be entitled to compensation in the administration of the estate.

Watson, Q.C., and *W. D. Swayze*, for the plaintiffs.

E. F. B. Johnston, Q.C., for the defendants J. and C. Herring.

Martin, Q.C., for the defendants the Synod of the Diocese of Niagara.

M. S. Mercer, for the defendants Scholfield and Stevens.

[MEREDITH, C.J., 10TH MAY, 1900.

MACDONALD v. GRAND TRUNK R. W. CO.

Railway company—Carriage of goods—Condition limiting liability for loss —51 V. c. 29 (D.)—Canadian company—Part of line in foreign country.

The Railway Act of Canada is not applicable to a railway situate in a foreign country, though operated by a company incorporated by or under the authority of the Parliament of Canada.

Therefore, where goods shipped from Scotland to be delivered at Portland, Maine, to the Grand Trunk Railway Company, and by that company to be forwarded thence to the plaintiffs at Toronto, were destroyed by fire on the line of that company in New Hampshire, by negligence from which they were protected from liability by the terms of the contract for carriage:—

Held, that the provisions of s. 246 of 51 V. c. 29 (D.) were not applicable to the defendants' contract; and an action to recover damages for the loss of the goods failed.

Aylesworth, Q.C., and *Spencer Love,* for the plaintiffs.

Wallace Nesbitt, Q.C., for the defendants.

[ROSE, J., 7TH MAY, 1900.

EVANS v. CHANDLER.

Costs—Scale of—Jurisdiction of County Courts—Ascertainment of amount—Price of goods sold.

In an action for the price of goods sold, in which the plaintiff recovered $290, it was contended that that amount was ascertained by the act of the parties, and therefore within the jurisdiction of the County Courts, because the goods were sold according to a price list agreed to, and therefore the amount was ascertainable by a simple computation.

Held, not so.

Thompson v. *Pearson,* 18 P. R. 420, distinguished.

W. R. Smyth, for the plaintiff.

D. E. Thomson, Q.C., for the defendants.

[9TH MAY, 1900.

PIGOTT v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

Insurance—Employer's liability contract—Alteration after execution—Foreign company—Local agent—Authority—Notice.

A local agent of an English insurance company, without authority from any one, upon the request of the assured, and after some correspondence with the chief agent for the company in Ontario as to other changes which had been refused, to the knowledge of the assured, altered an employer's liability policy which had been sent to him for delivery to the assured by making it comprehend the workmen at a place other than those named in the policy, and then handed it to the assured, who paid him the premium. He then sent the

premium to the chief agent for Ontario, and advised him at the same time of the alteration made. The power to make any change in the policy did not rest in the local agents nor in the chief agent for Ontario, but only in the manager and attorney for Canada, who was not notified of the alteration.

Held, that the company could not be considered to have authorized the alteration and were not bound by the contract as altered.

Osler, Q.C., and *Bruce*, Q.C., for the plaintiffs.

Aylesworth, Q.C., for the defendants.

IN CHAMBERS.

[MEREDITH, C.J., 10TH MAY, 1900.

In re NILICK v. MARKS.

Prohibition—Division Court—Judgment—Setting aside—Fraud—Jurisdiction.

Motion by the defendant for an order prohibiting the junior Judge of the District of Algoma from further proceeding with this plaint in the 4th Division Court in that district, upon the ground that the Judge had no jurisdiction to set aside the judgment which had been directed to be entered, and to order a new trial, inasmuch as no application for a new trial was made within fourteen days after the trial.

Held, that a Judge presiding over a Division Court has no jurisdiction to grant a new trial unless the application is made within the fourteen days prescribed by s. 152 of the Division Courts Act. Nor has he jurisdiction, apart from that section, to set aside a judgment even though it has been obtained by fraud, where it has been pronounced at the trial. Nor has a Division Court jurisdiction in an action to set aside a judgment obtained by fraud, that not being one of the cases in which jurisdiction is conferred by s. 72 of the Act.

In England relief may be had in such cases in the High Court by an action: *Cole* v. *Langford*, [1898] 2 Q. B. 36; and in Ontario by petition in the action: Rule 642.

Order made for prohibition with costs.

Grayson Smith, for the defendant.

A. F. McMichael, for the plaintiff.

[15TH MAY, 1900.

SEGSWORTH v. McKINNON.

Venue—Writ of summons—Indorsement—Election—Rules 138 (2), 529.

Where in the special indorsement of his writ of summons the plaintiff names a place of trial, he is not at liberty to change by naming another place in his statement of claim. Rule 529 must be read subject to the provision of Rule 138 (2).

R. S. Robertson, for the plaintiff.

W. H. Blake, for the defendant.

MANITOBA.

In the Queen's Bench.

[KILLAM, C.J., 11TH APRIL, 1900.

ROBOCK v. PETERS.

Mechanics' liens — Priority of lien-holders and mortgagees — Parties — Continuing contract for supply of materials — Lien for expenses of mortgage.

This action was brought to enforce a lien claimed by the plaintiff upon land of which the defendant was the owner, for work done and materials provided by the plaintiff upon and in a building erected by the defendant, and for which the defendant contracted to pay the plaintiff $400.

In the summer of 1899, the defendant was the vendee of certain lots, upon which he had paid only a portion of the purchase money. Before obtaining a conveyance he proceeded to erect buildings, and contracted with the plaintiff to do work

thereon. The plaintiff's work was commenced in July and finished on the 5th September. On the 22nd September the plaintiff registered his claim to a lien in the proper registry office; he began his action on the 31st October, and registered a certificate of *lis pendens* on the 2nd November. The defendant put in no defence, and the plaintiff obtained an appointment under s. 31 of the Mechanics' and Wage-Earners' Lien Act, 1898, for the trial of the action before a Judge, and served notice of trial upon the original defendant and also upon Stewart, Whitworth, the Western Co-operative Loan Company, Bowen, Strang, and Drewry. Stewart claimed a lien for lumber and materials supplied to Peters for use in the erection of the buildings; Whitworth claimed as grantee from Peters under a conveyance, absolute in form, but admittedly given by way of security only; the other parties claimed to be mortgagees of the land from Peters.

In June, 1899, Peters applied to Stewart to furnish lumber and materials for the building upon credit, which Stewart did, in small parcels, from time to time, as Peters required them. Stewart began to supply materials on the 16th June, and continued to do so until the 27th October. The dates and prices of the last three parcels supplied were: 25th September, $5.26; 18th October, $2; and 27th October, $2.76. The total amount was $516.67.

The building was sufficiently completed for occupation and the defendant moved into and used it in July or August, but there still remained work to be done upon it, and workmen were engaged there until after the 27th October, and the materials supplied in September and October were used in finishing up the buildings.

On the 25th November Stewart registered a claim to a lien, stating that the materials were supplied between the 1st August and the 27th October, 1899, naming Peters alone as the reputed owner, and claiming $526.67. On the 20th January, 1900, Stewart commenced an action against Peters to enforce his lien, in which he claimed $436.67, and he registered a certificate of *lis pendens* on the same day; the difference in amount was made by crediting certain items agreed on.

On the 5th August, 1899, Peters obtained from Bowen a loan of $300 and executed a mortgage of the land to Bowen

to secure payment of $435. The remaining $135 were to be advanced by Bowen in payment of the balance of the purchase money of the land.

Subsequently the land was conveyed by his vendor to Peters by deed dated 4th October, 1899, upon which was indorsed an affidavit of execution dated 18th October, 1899. A few days after this latter date Bowen paid over the $135 to the vendor; he did not register his mortgage until the 7th November.

Bowen was the local solicitor at Morden of the Western Co-operative Loan Company, to which Peters applied for a loan of $1,500 on security of the land and buildings in question. This loan appeared to have been contemplated when Bowen made his first advance, but the first definite step towards it was made by a written application dated the 31st August, 1899. The application contained a clause by which the applicant promised to pay "the expenses of examination, recording papers, solicitors and valuators, and all other expenses in conection with this loan."

The mortgage to the company was drawn up to secure $900 only. It bore date the 3rd October, 1899, and was registered on the 20th October, 1899. No money was advanced upon it, but the company claimed to hold it as security for $22.75, solicitor's fees and disbursements and other expenses of the loan.

Strang and Drewry sold to Peters, separately, goods for use in his business. Being indebted to Strang in $412 and to Drewery in $222.87, he executed a mortgage of the land in question to Strang and Drewry jointly to secure $612. The mortgage was really given to secure the separate claims of Strang and Drewry. It was dated the 17th November, 1899, and registered the 18th November.

The conveyance from Peters to Whitworth bore date the 30th January, 1900, and was registered the 1st February, 1900.

It was not disputed that the plaintiff had a valid lien as against Peters. The only questions affecting his claim were that of priority over the other parties and one of practice.

Stewart's lien was disputed on the ground of failure to register in time and defects in the registered claim.

By s. 20, s.-s. 2, of the Act, a claim for lien for materials may be registered before or during the furnishing or placing thereof or within 30 days after the finishing or placing of the last materials so furnished or placed.

Held, that this action was one in which Stewart's claim might be realized, although he was not formally made a party to it. It was commenced and the certificate of *lis pendens* was registered before Stewart registered his claim, and this was sufficient, if done in time, to protect Stewart's lien, as against Peters, without specific registration. Although the initial arrangement was not a binding contract for the supply of any definite kinds or quantities of materials, or even of all such as should be required, yet the whole transaction was so linked together as to constitute a single cause of action, and the time for registration or bringing an action ran from the supply of the last of the materials in respect of the whole bill: *Morris* v. *Tharle*, 24 O. R. 159.

It did not appear to affect the matter that the latest orders were at long intervals, for small quantities of goods, after the bulk of the work had been done and the building occupied and used. The articles were *bona fide* required for small finishing jobs. Stewart's lien was subsisting and valid as against Peters.

Subsequent incumbrancers on whom notice of trial has been served may be dealt with as if they were actually parties to the action. Those who could have been made parties in the Master's office, if the usual procedure had been followed out, can now be treated as if so added when brought in at the trial by notice of trial.

The plaintiff's claim was under one contract, by which he did work and furnished materials for a lump sum. He began his work before any of the mortgages were made by the defendant. He registered his claim before the registration of any of these mortgages, without any notice of them. Under both s. 4, s.-s. 2, and s. 19, the plaintiff stood first.

As to the question of priority between Stewart and the mortgagees. Stewart's claim was for materials solely, and there was no difficulty in severing the value of those supplied before and after the making of the mortgages. It might be assumed that the dates of supply, as shown by the account produced, were the dates of "placing" upon the premises.

Bowen's mortgage bore date the 5th August. On that day he advanced $300. On the same day Stewart supplied goods to the value of $41.09. There was no evidence as to which was done first. The plaintiff proved the various mortgages in opening. The onus was then thrown upon Stewart to prove a priority. Bowen's original advance should be placed ahead of Stewart's lien for the $41.09.

The Western Co-operative Loan Company's mortgage was dated the 3rd October. The amount claimed for expenses was admitted to be a charge upon the land. The company had priority of registration over Bowen, and there was no evidence of notice of the Bowen mortgage. The company, therefore, should have priority over Bowen.

According to Bowen's evidence, the last $135 was not advanced upon his mortgage until a few days after the 18th October. It would not be assumed that the advance was before the 27th October, when Stewart supplied the last of his materials. The application to the company for a loan should be treated, under the circumstances, as sufficient notice in writing of Stewart's lien to postpone Bowen's charge for this advance under s. 11, s.-s. (1). The application was left with Bowen, one of the local directors, who signed the recommendation indorsed upon it. The application seemed to sufficiently imply the existence of Stewart's lien to some amount; it showed money to be due to Stewart for materials used in the building. Notice of the fact of indebtedness for materials would seem to be *prima facie* notice of the lien. The written notice need be only such as, in view of the circumstances of the case, would bring home to the mind of the mortgagee reading it *prima facie* notice of the existence of a lien.

Bowen claimed to be subrogated to the position of Peters's vendor in respect of the portion of the purchase money advanced by him. The deed of conveyance to Peters in fee was delivered to Bowen on payment of the amount.

When Bowen advanced the amount he had notice of Stewart's lien; although he might not then have had actual notice of the plaintiff's lien, he must be held to have then had constructive notice of it; he knew that the plaintiff was working on the premises. Constructive notice is merely notice of such facts as should put a party upon inquiry which would lead to actual notice.

Bowen could not have priority over either lien-holder for the purpose of the amount he advanced.

Result. There must be a decree for enforcing the liens. The plaintiff and Stewart stand first, *pro rata*; Stewart to the amount only of the goods supplied prior to the 5th August, deducting all payments. Then the Western Co-operative Loan Company, then Bowen to the amount of $300 and interest, less the claim of the company; then Stewart for the goods supplied on and after the 5th August, and before the 3rd October; then Bowen for the company's claim; then Stewart for the balance of his account; then Bowen for his last advance and interest; then Drewry and Strang; then Whitworth.

The mortgagees should be allowed to add their taxable costs to their respective claims; Bowen's to go with his first charge.

The plaintiff and Stewart could not together recover for costs a larger sum than one-fourth their aggregate claims and taxable disbursements.

Crawford, Q.C., for the plaintiff.

Phippen, for lien-holders.

Perdue and *McPherson*, for the mortgagees.

Huggard, for the owner.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 9TH JANUARY, 1900.

HALEY v. McLAREN.

Appeal—Extending time for depositing appeal books—Application—Forum.

Appeal books were not deposited in time, and, on an application to extend the time, the full Court was asked to express an opinion whether such applications should be made in Chambers or to the full Court.

Held, that application should be made as soon as possible and to a Judge in Chambers, if the full Court is not sitting

at the time. If the full Court is sitting at the time, the better course is to apply there in the first instance.

The application was allowed and the case set at the foot of the list.

[15TH JANUARY, 1900.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. ESQUIMALT AND NANAIMO R. W. CO.

Crown—Prerogative of—Right of Attorney-General to injunction to restrain action—Public harbour—Minerals.

Appeal from injunction order. On 27th January, 1898, the defendants brought an action against the New Vancouver Coal Mining and Land Company, limited, for a declaration that they were entitled to the coal under the sea opposite the lands known as the Newcastle Town-site Reserve, claiming them under letters patent from the Dominion dated the 21st April, 1897. The action was ready for trial, and on 5th September, 1899, the Attorney-General for British Columbia and the New Vancouver Company commenced this present action against the Esquimalt and Nanaimo Railway Company for a declaration that the right of coal under the foreshore and opposite to Newcastle Town-site Reserve was vested in the Crown in right of the Province, and for an injunction to restrain the defendants from further prosecuting their action. On the application of the plaintiffs, the Chief Justice made an order restraining the further prosecution of the action until the determination of this action.

Held, on appeal, MARTIN, J., dissenting, that the order was properly made.

The Supreme Court of British Columbia has all the powers of the Exchequer Court in England, and all the machinery necessary for the exercise thereof.

Per MARTIN, J.—The Crown, in right of the Province of British Columbia, has no interest in the property in litigation and is not entitled to exercise any prerogative in relation thereto.

The minerals under the waters and bed of Nanaimo harbour at the time of the Crown grant of 21st April, 1897, were the property of the Dominion.

Bodwell, Q.C., and *Duff*, for the appellants.

Davis, Q.C., for the respondent.

Supreme Court of Canada.

ONTARIO.] [30TH MAY, 1900.

In re CITY OF TORONTO AND CANADIAN PACIFIC R. W. CO.

Appeal—Vendor and Purchaser Act—Reference—Admission of evidence—Appeal from certificate—Final judgment.

By agreement in writing the corporation of the city of Toronto undertook to acquire certain land and lease it to the railway company for fifty years, renewable in perpetuity. An abstract of title having been refused, the company obtained an order of the Court, under the Vendor and Purchaser Act, for its delivery and a reference of all matters respecting the title to a referee. The title was made out and a draft lease presented to the referee, containing a covenant by the company to pay taxes, to which exceptions were filed. The city corporation then proposed to give evidence of negotiations prior to the written agreement, showing that the covenant should be inserted, which the referee allowed and granted a certificate therefor, from which the company appealed. The certificate having been sustained by a Divisional Court and the Court of Appeal, the company appealed to the Supreme Court.

Held, GWYNNE, J., dissenting, that the judgment appealed from was not a final judgment within the meaning of the Supreme and Exchequer Courts Act, nor was it a decree or decretal order in a judicial proceeding in the nature of a suit or proceeding in equity under s. 24 (*e*) of that Act; the Court had, therefore, no jurisdiction to hear the appeal.

Appeal quashed with costs.

Armour, Q.C., and *Angus MacMurchy*, for the appellants.

Robinson, Q.C., and *Fullerton*, Q.C., for the respondents.

QUEBEC.] [8TH MAY, 1900.

BROWN v. TORRANCE.

Principal and surety—Conditional warranty—Notice—Possession of goods.

T. wrote a letter agreeing to guarantee payment for goods consigned on *del credere* commission to R., on condition that he should be allowed, should occasion arise, to take over the goods consigned. Shortly afterwards the creditor, without giving any notice to T., closed the agency, withdrew some of the goods, and permitted others to be seized in execution and removed beyond the reach of T. The creditor did not give T. any authority to take possession of the goods as stipulated in the letter of guaranty. In an action by the creditor to recover the amount of the guaranty:—

Held, that the conditions of the guaranty had not been complied with by the creditor, and that he could not hold the warrantor responsible.

Hutchison, Q.C., for the appellant.

Holt, for the respondent.

GRIFFITH v. HARWOOD.

Appeal—Jurisdiction—Final judgment—Plea of prescription—Judgment dismissing—Costs.

A judgment affirming the dismissal of a plea of prescription, when other pleas remain on the record, is not a final judgment from which an appeal lies to the Supreme Court of Canada.

An objection to the jurisdiction of the Court should be taken at the earliest moment. If left until the case comes on for hearing and the appeal is quashed, the respondent may be allowed costs of a motion only.

Hamel v. *Hamel*, 26 S. C. R. 17, approved and followed.

Appeal quashed with costs.

Atwater, Q.C., and *Duclos*, for the appellant.

Ryan, for the respondent.

BANQUE JACQUES-CARTIER v. GRATTON.

Will—Powers of executors—Promissory note—Advancing legatee's share.

M., who was a merchant, by his will gave a special direction for the winding up of his business and the division of his estate among a number of his children as legatees, and gave to his executors, among other powers, the power "to make, sign, and indorse all notes that might be required to settle and liquidate the affairs of his succession." By a subsequent clause in his will he gave his executors "all necessary right and powers at any time to pay to any of his said children over the age of 30 years, the whole or any part of their share in his said estate for their assistance, either in establishment, or, in case of need, the whole, according to the discretion, prudence, and wisdom of said executors," etc. In an action against the executors to recover the amount of promissory notes given by the executors, and discounted by them as such in order to secure a loan of money for the purpose of advancing the amount of his legacy to one of the children who was in need of funds to pay personal debts:—

Held, affirming the judgment appealed from, that the two clauses of the will referred to were separate and distinct provisions which could not be construed together as giving power to the executors to raise the loan upon promissory notes for the purpose of advancing the share of one of the beneficiaries under the will.

Brousseau, for the appellant.

Aimé Geoffrion, for the respondent.

[11TH MAY, 1900.

SCHLOMANN v. DOWKER.

Partnership—Judicial abandonment—Estoppel—Quashing appeal.

The defendants severally contested a demand for judicial abandonment, on the ground that they were not partners in the firm upon which the demand had been made. The judgments appealed from declared them to be partners

and that the demand was well founded. They then abandoned their property under reserve of exception taken to the judgments and of their recourse by appeal to the Supreme Court of Canada, and declared that the abandonment was consented to under these reserves and in order to avoid a *capias*, penalties, trouble, and costs. After a curator had been appointed, and while the estate was being realized and distributed, they commenced proceedings for appeals to the Supreme Court of Canada. On motions to quash the appeals:—

Held, SEDGEWICK, J., *dubitante*, that the abandonment made was an *acquiescement* and voluntary execution of the judgments in question, and estopped the defendants from further appeal.

Held, further, that when possible the practice should be adopted of moving to quash appeals in which only a question of costs is involved.

Appeal quashed with costs.

Atwater, Q.C., for the motion.

Belcourt, Q.C., contra.

[17TH MAY, 1900.

NOEL v. CHEVREFILS.

Appeal—Jurisdiction—Matter in controversy—Tutorship—Petition for cancellation of appointment.

The Supreme Court of Canada has no jurisdiction to entertain an appeal from a judgment pronounced in a controversy in respect to the cancellation of the appointment of a tutrix to minor children.

Appeal quashed with costs.

Bisaillon, Q.C., for the motion.

Fitzpatrick, Q.C., S.-G., contra.

CULLY v. FERDAIS.

Appeal—Jurisdiction—Servitude—Action confessoire—Execution of judgment—Right of way—Opposition to writ of possession—Matter in controversy—Title to land—Future rights.

An opposition to a writ of possession issued in execution of a judgment allowing a right of way over the opposant's land does not raise a question of title to land nor bind future rights, and in such a case the Supreme Court of Canada has no jurisdiction to entertain an appeal.

Langevin v. *Les Commissaires d'Ecole de St. Marc*, 18 S. C. R. 599; *O'Dell* v. *Gregory*, 24 S. C. R. 661; *Riou* v. *Riou*, 28 S. C. R. 53; *Chamberland* v. *Fortier*, 23 S. C. R. 371; *La Commune de Berthier* v. *Denis*, 27 S. C. R. 147; and *McGcey* v. *Leamy*, 27 S. C. R. 193, 545, discussed.

Appeal quashed with costs.

Lajoie, for the motion.

Lafleur, Q.C., contra.

BRITISH COLUMBIA.] [18TH MAY, 1900.

DUNSMUIR v. LOWENBERG, HARRIS, AND CO.

Contract—Parol evidence—Collateral verbal contract—Question for jury—New trial.

D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned, and agreeing to pay a commission of five per cent. on the selling price, such commission to include all expenses. H. failed to effect a sale.

Held, affirming the judgment in 6 Brit. Col. L. R. 505, that in an action by H. to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration, parol evidence was admissible to show that the written instructions did not constitute the whole of the terms of the contract, but there had been a collateral oral agreement in respect to the expenses; and that the question as to whether or not there was an oral contract in addition to what appeared in the written instructions was a question that ought properly to have been submitted to the jury.

Aylesworth, Q.C., for the appellant.

S. H. Blake, Q.C., for the respondents.

Exchequer Court of Canada.

[BURBIDGE, J., 17TH APRIL, 1900.

In re METROPOLITAN R. W. CO.

Railways—Order of Railway Committee of Privy Council—Making rule of Exchequer Court—Condition—Ex parte order—Practice.

By s. 29 of the Railway Act, 51 V. c. 17, the Exchequer Court is empowered to make an order of the Railway Committee of the Privy Council a rule of Court; but where there are proceedings depending in another Court in which the rights of the parties under the order of the Railway Committee may come in question, the Exchequer Court, in granting the rule, may suspend the execution until further direction.

2. The Court refused to make the order of the Railway Committee in this case a rule of Court upon a mere *ex parte* application, and required that all parties interested in the matter should have notice of the same.

W. Barwick, Q.C., and *Glyn Osler*, for the motion.

H. L. Drayton, contra.

[7TH MAY, 1900.

GENERAL ENGINEERING CO. OF ONTARIO v. DOMINION COTTON MILLS CO.

Patent—Expiry of foreign patent—Meaning of "foreign patent"—"Exists."

By the Patent Act, R. S. C. c. 61, s. 8, as amended by 55 & 56 V. c. 24, s. 1, it is enacted that "under any circumstances if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same expires."

J. filed an application for a Canadian patent for new and useful improvements in boiler and other furnaces on the 1st March, 1892. On the same day he applied for a British patent and also for an Italian patent in respect of the same

invention. The British application was accepted on the 30th April, 1892, and the patent issued on the 12th July, but was dated, as is the practice in England, as of the date of the application, viz., the 1st March, 1892. The Italian patent was issued on the 19th March, 1892, and was granted for a term of six years from that date. The Canadian patent was granted on the 15th October, 1892. The British patent became forfeited for non-payment of certain fees and annuities due thereon on the 1st March, 1897. The inventor was in default in respect of payment of fees on the Italian patent in 1895, and while there was some doubt whether such default operated as a forfeiture *ipso facto* under the Italian law, there was no doubt that it expired at the end of the six years when no steps were taken by the inventor for its renewal.

Held, that the Canadian patent was void.

2. That the words "foreign patent" as used in the above enactment include all patents that are not Canadian.

3. That the word "exists" has reference to the date or time when the Canadian patent is granted, not when it is applied for.

4. That the words "shall expire at the earliest date on which any foreign patent for the same invention expires" are not to be limited to the expiration by lapse of time of the potential term of the foreign patent, but include any ending at a time earlier than the end of the term for which the patent is granted.

McHUGH v. THE QUEEN.

Crown — Negligence — Public work — Bridge — Maintenance — Minister of Public Works.

There is nothing in the Public Works Act, R. S. C. c. 36, in relation to the maintenance and repair by the Minister of Public Works of bridges belonging to the Dominion Government, which makes him "an officer or servant of the Crown" for whose negligence the Crown would be liable under s. 16 (*c*) of the Exchequer Court Act, 50 & 51 V. c. 16.

[16TH MAY, 1900.

REGINA v. FITZGIBBON.

REGINA v. THOURET.

Revenue—Customs Act, s. 192—Penalties—Jurisdiction of Exchequer Court—Discretion of Judge—Remission of penalty.

The penalty enforceable under the provisions of s. 192 of the Customs Act in the Exchequer Court is a pecuniary one only; the other remedies open to the Crown thereunder cannot be prosecuted in this Court.

2. The Court has no discretion as to the amount of the penalty recoverable under such enactment.

3. If a case is established against any defendant, the whole penalty prescribed by the statute must be enforced. The power of remitting such penalty is vested in the Governor in Council by the Audit Act, R. S. C. c. 29, s. 78. In view of this state of the law, it is proper for the Crown, if it sees fit, during the pendency of an action for penalties, to agree upon terms of settlement of the action with the defendant; but those acting on behalf of the Crown should see that the judgment asked for in confirmation of the settlement is for a sum which will vindicate the law and will conserve the public interest.

Fitzpatrick, Q.C., S.-G., and *Newcombe*, Q.C., for the Crown.

Madore and *Guerin*, for the defendants.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 23RD APRIL, 1900.

In re LUCAS, TANNER, AND COMPANY.

Statute—Retroactivity—Penal enactment—Insolvent—Committal for fraud.

An appeal by a member of the above firm, by whom an assignment for the general benefit of creditors had been

made under R. S. O. c. 147, from an order in Chambers under s. 36, committing the appellant to gaol for unsatisfactory answers upon his examination at the instance of the assignee under s. 34 of the Act, and for having sold or made away with his property in order to defeat or defraud his creditors, as disclosed by such examination.

Held, that the acts of the appellant having been commited before the passing of 58 V. c. 23, which was the original of s. 36, the order could not be upheld; the legislation being penal in its nature was not to be applied to acts done before it was passed.

It was contended by the appellant that s. 36 was *ultra vires* of the Provincial Legislature, but no opinion was expressed upon this point.

John A. Ferguson and *O. A. Langley*, for Charles E. Tanner.

Aylesworth, Q.C., for the assignee.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

[FERGUSON, J., ROBERTSON, J., 10TH MAY, 1900.

THOMPSON v. McRAE.

Division Court—Trial—Adjournment—Payment of costs—New trial—Time for moving.

Where at the sittings of a Division Court a case was "adjourned for plaintiff on payment of costs within ten days, otherwise judgment for the defendant:"—

Held, that the two weeks within which a motion could be made for a new trial (costs not being paid) did not commence to run until the expiration of the ten days, for until then there was no judgment.

C. C. Robinson and *Stonehouse*, for the plaintiff.

Boys, for the defendant.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 4TH JUNE, 1900.

In re NILICK v. MARKS.

Prohibition—Division Court—Judgment—Setting aside—Fraud—Jurisdiction.

Decision of MEREDITH, C.J., *ante* 261, affirmed.

A. F. McMichael, for the plaintiff.

Grayson Smith, for the defendant.

[STREET, J., 27TH APRIL, 1900.

JAMES v. GRAND TRUNK R. W. CO.

Railway—Culvert—Duty to fence—Negligence.

A watercourse, which flowed through a culvert under a railway track, became dried up in the summer; and, to prevent cattle from passing through it, the railway company had gates placed in the culvert, but neglected to keep them up. The company were duly notified and required to supply gates, but did not do so, and the plaintiff's cattle, which were pasturing in a field on one side of the track, the watercourse being dried up, got through the culvert into a field on the other side of the track and thence on to the railway track, where they were injured.

Held, that the railway company were liable for the damages sustained thereby by the plaintiff.

Teetzel, Q.C., and *G. C. Thomson,* for the plaintiff.

H. S. Osler, for the defendants.

[28TH APRIL, 1900.

FARR v. HOWELL.

Mortgage—Conveyance of equity of redemption by mortgagor—Expropriation proceedings—Right of mortgagor to notice of.

A mortgagor who has conveyed away his equity of redemption is not entitled to notice of expropriation proceedings taken by a railway company with regard to part of the

mortgaged lands; and, therefore, the absence of such notice does not constitute any defence to an action brought against him by the mortgagor on a covenant to pay the mortgage money.

D'Arcy Tate, for the plaintiff.

P. D. Crerar, for the defendant.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 19TH MAY, 1900.

BRAND v. GREEN.

Foreign company—Dissolution of—Assets in Manitoba—Jurisdiction to entertain action against.

The plaintiffs were a firm residing and carrying on business at Boston, Mass. The defendants were a company incorporated under the laws of the State of New York, having their offices and place of business in that State.

The action was brought to recover for goods sold by the plaintiffs to the defendants. Most of the goods were ordered by letter; some were ordered verbally by agents of the defendants at the plaintiffs' place of business in Boston. All were delivered by shipment on a railway at Boston for carriage to the defendants' place of business in New York. The corporation had no agency, office, or place of business in Manitoba. The plaintiffs claimed the right to sue in Manitoba solely upon the ground that when the action was brought the defendant corporation had assets within Manitoba sufficient for the purpose under Rule 196 of the Queen's Bench Act, 1895, as amended by 61 V. c. 13. The alleged assets consisted of the indebtedness of a merchant in Winnipeg for goods purchased by him from the defendants; an order attaching this indebtedness was issued and served.

On the 13th April, 1898, proceedings were instituted by the Attorney-General for the State of New York in the

Supreme Court of that State and in the name of the People of the State, to have the defendant corporation dissolved and their corporate rights, privileges, and franchises forfeited; to restrain the corporation, their trustees, directors, and officers from exercising any of their corporate rights, etc.; for the appointment of a receiver of their property; and for an injunction to restrain their creditors from commencing any proceedings against them.

In the proceedings thus instituted an order was made on the 14th April, 1898, restraining the corporation or their officers from exercising any of their corporate franchises and from collecting any debts belonging to the defendants, etc., and a temporary receiver was appointed of the property of the corporation. On the 5th May, 1898, in the same cause, the Supreme Court of New York pronounced a judgment by which it was "adjudged and decreed" that the corporation be dissolved and their corporate rights forfeited; that the corporation and their officers were enjoined from exercising the corporate powers of the corporation or receiving debts due to them; and that a permanent receiver be appointed.

The action was commenced and the attaching order issued after the making of the order of the 14th April, and before the final judgment dissolving the corporation. The trial Judge dismissed the action, being of opinion that the corporation had not assets in Manitoba, within the meaning of Rule 196, and that the Court had no jurisdiction to entertain the action. The plaintiffs appealed to the full Court.

Held, that the appeal should be dismissed with costs.

From the circumstances and the course of business it must be implied that the debt of the Winnipeg merchant was payable at the office of the corporation in the State of New York; still, that debt must be considered to have been an asset of the corporation in Manitoba. By Rule 465*a* the Court is authorized to take judicial notice of the laws of any part of the United States of America. The Supreme Court of New York is a Superior Court of Record; it had jurisdiction of the matter; and it made such order and gave such judgment as it had jurisdiction to make and give. This Court must assume them to have been valid and effectual in New York. Both the interim order and the final judgment

included the Winnipeg debt among the assets which the receiver was to collect, and which the corporation was restrained from collecting or alienating. Such a receiver takes no title to the property of which he is made receiver. He is but an officer of the Court, to take and hold it subject to the disposition of the Court. The Court enjoined the corporation from collecting or alienating their assets. This order was not directly operative and could not be enforced out of the State of New York; it did not assume to bind property; it acted *in personam* only. But it raised an equity against the corporation which could not be wholly disregarded here.

It is a principle of English law that the attachment or assignment by involuntary proceedings under the bankruptcy laws of a foreign country in which a bankrupt is domiciled affects or transfers the title to his purely personal property in England: *Solomons* v. *Ross*, 1 H. Bl. 131 *n.*; *Jollet* v. *Deponthien*, *ib.* 132 *n.*

The interim order in New York created such a right in those interested, as against the corporation, to prevent the corporation dealing with its assets, as precluded the attachment of the debt here.

The corporation, therefore, had not at the commencement of the action assets in Manitoba of the value of $200 which might be rendered liable to the judgment in case the plaintiffs should recover.

The company were personally bound to the application of their assets as should be adjudged by the Supreme Court of New York. The existence of the liquidation proceedings and the order afforded *prima facie* evidence of the insolvency of the corporation.

Perdue, for the plaintiffs.

Haggart, Q.C., for the defendants.

[2ND JUNE, 1900.

In re ST. BONIFACE PROVINCIAL ELECTION.

Parliamentary elections—Petition—Security for costs—"Current money of Canada"—Compliance with statute.

An appeal from the decision of BAIN, J., *ante* 183, was dismissed with costs to the petitioner in any event.

Held, that, after the petitioner has obtained what he believes to be current money of Canada and has paid it over as required by law to the prothonotary, and has lost all further control over it, and after the prothonotary has received it as such current money of Canada, it should, until the contrary is shown, be assumed by the Court that the money so deposited was current money of Canada as required by the Act, and thereafter the onus is on the respondent to shew that it is not such. There being no such evidence produced by the respondent, he must be considered as having failed to substantiate his objection.

It was contended that the receipt given by the prothonotary, which stated the purposes for which the money was deposited, did not cover all that was required by ss. 21 and 22 of the Act.

Held, that the deposit of the $750 with the prothonotary was a sufficient compliance with the requirement of the statute.

In re ROSENFELDT PROVINCIAL ELECTION.

Parliamentary elections — Petition — Presentation — Time — Return to clerk of executive council—Notice in Gazette—Second return.

The point raised in this matter was that the petition was not filed within the time prescribed by statute.

The Manitoba Controverted Elections Act, R. S. M. c. 29, s. 18, provides that "the petition must be presented within 30 days after the day of publication in the Manitoba Gazette of the notice of election by the clerk of the executive council."

The election was held on the 7th December, 1899. On the 8th December the returning officer declared the respondent elected. On the 14th December he made his return to the clerk of the executive council, and the latter on the 16th December published in the Manitoba Gazette the notice of the election. The petition was filed on the 15th January, 1900, within thirty days from the publication as required by s. 18 of the Act .

It appeared, however, that on the 12th December notice of a recount was given to the returning officer under s. 190

et seq. of the Manitoba Election Act, R. S. M. c. 49; that the recount was held; that the Judge who held it gave to the returning officer on the 16th December a certificate of the result of the recount; that on the 28th February, 1900, the returning officer made another return to the clerk of the executive council, who published another notice of election in the Manitoba Gazette of the 3rd March. The last return and publication were made several weeks after the filing of the petition.

The respondent contended that the last return and the last publication were the only true and legal return and publication; and that the former return and publication were null and void, and formed no foundation for the filing of the petition.

KILLAM, C.J., held that, as there was a return valid upon its face, which justified the clerk of the executive council in publishing the notice in the Gazette, it could not be said that the return and notice were nullities, so that the time had not arrived for filing a petition, by reason of the existence of facts not appearing on the return.

The respondent appealed.

Held, that the return that was made to the clerk of the council was valid on its face, and it was the duty of the clerk when he received it to publish in the Gazette the name of the candidate elected. The Act directs that the petition must be presented within thirty days after the day of the publication of the notice in the Gazette.

The petitioners, if they intended to question the return of the member elect, had no alternative but to file their petition against the return, which was the only one existing at the time.

Ewart, Q.C., and *Wilson,* for the petitioners.

Aikins, Q.C., and *Crawford,* for the respondent.

FRASER v. SWEET.

Partnership—Purchase of goods by one partner—Ratification.

County Court appeal. The action was brought against O. J. Sweet and W. Smith, trading as Sweet & Smith, to recover the price of goods sold and delivered by the plaintiff.

The defendants were carrying on business in co-partnership, under the name of Sweet & Smith, at Rabbit Point, on Lake Winnipeg. In 1899, differences having arisen, Smith made Sweet an offer for the purpose of dissolution, which Sweet accepted. But it was objected to by a creditor, and was not carried out. In June, 1899, Sweet came to Winnipeg without the knowledge of his partner and purchased the goods in question. By his instructions they were consigned and charged to O. J. Sweet & Co., and a promissory note was given for them in that name. The goods were put in boxes addressed to O. J. Sweet & Co., and sent to Selkirk, where they were transhipped to a boat which carried them to Rabbit Point. At Selkirk Sweet met his partner Smith, and both went home on the boat which carried the goods. Smith saw the boxes and the address and stated that he supposed Sweet had bought the goods on his own account. Part of the goods were sold by Sweet and part were seized under execution against the firm. Sweet stated that when he came to Winnipeg he expected to dissolve; that he made the change to O. J. Sweet & Co. "with the expectation of there being a change in the firm or otherwise," and that he expected this would hold anyone who was in the firm.

The plaintiff's agent, in making the sale, asked the reason of the change of name, and Sweet told him that there might possibly be a change in the style of the firm.

The agent stated that the credit was given to O. J. Sweet & Co., and that the goods were so charged. The particulars of claim were originally made out against O. J. Sweet & Co.

The County Court Judge gave judgment for the plaintiff against both defendants, and Smith appealed on the ground that there was no sale of the goods to him or on his credit, and that he was never liable to the plaintiff for them.

Held, that Sweet did not intend, when he made the purchase, to buy on account of himself and Smith. He had then made his offer to Smith for a dissolution; it had been accepted; and Sweet expected it would be carried out. It was only after the purchase that he learned of the opposition of the creditor. The making of the purchase unknown to his partner and under a different name from that of the

firm, abundantly warranted the inference that he was not purchasing for the existing firm.

It is only a party to a contract who can be sued upon it, and one for whom the party making the contract does not assume or intend to contract, cannot be considered a party to it.

As the plaintiff's agent gave credit to O. J. Sweet & Co., he can hold only those intended to be designated by that name.

As to ratification, see *Durant* v. *Roberts*, 16 Times L. R. 244.

Appeal allowed.

Phippen, for the plaintiff.

Ewart, Q.C., and *O'Reilly*, for the defendant Smith.

LAKE OF THE WOODS MILLING CO. v. COLLIN.

Attachment of debts—Fire insurance—Moneys payable under policy—Proof of loss—Condition precedent—Setting aside attaching order.

Application to set aside an attaching order. The order was in the form given by 60 V. c. 5, directing that "all debts, obligations, and liabilities owing, payable, or accruing due" from certain garnishees be attached to answer the judgment to be recovered.

The insured property was damaged by fire before the making of the attaching order.

There were policies in three companies. As to one, the Phœnix of Hartford, there was an affidavit by the general agent showing that the only debt, obligation, or liability owing, payable, or accruing due from the company to the defendant, was under a policy of insurance issued by the company and in respect by a certain loss by fire. Incorporated in the policy were the statutory conditions given by 51 V. c. 26. The loss was not to be payable until thirty days

after the completion of the proofs of loss, and there was a condition that the company, instead of making payment, might repair or rebuild, giving notice of intention to do this within 30 days after the receipt of the proof required.

The question was whether there was an attachable debt, obligation, or liability of the company to the defendant.

Held, that an order should be made setting aside the attaching order as against the Phœnix Company of Hartford without costs.

The insurance moneys were not payable when the attaching order was made. The policy distinctly provided that the money was not to be payable until 30 days after the completion of the proofs of loss. This was a condition precedent to liability: *Commercial Union Ass. Co.* v. *Margeson*, 29 S. C. R. 601.

Only a pecuniary liability can be attached. The money was not "accruing due." These words refer only to such liabilities as are *debita in præsenti, solvenda in futuro*. There was not an attachable liability, because the company's liability was not necessarily pecuniary; there was an option to replace. No liability can be deemed attachable unless it is an absolute unconditional liability to pay money either at once or at a future time.

The insurance moneys were not "owing, payable, or accruing due" under the policy when the attaching order was made.

In the case of two other companies, the applicants failed to show that there was no attachable debt, obligation, or liability from either of them to defendant. They pointed to a certain contract between one of the companies and the defendant, and sought to have it declared that there was no attachable liability under that contract.

Held, that there was no practice warranting such an order. It was a common practice to set aside an attaching order when it was shown that there was nothing to attach, for then the order should not have been made. But, otherwise, declarations or decisions as to particular liabilities

should be had when there is an attempt to enforce the order, or some controversy as to who should receive the payments, or some other proceeding as to these liabilities.

Ewart, Q.C., and *Wilson*, for the plaintiffs.

Howell, Q.C., and *Mathers*, for the applicants.

[BAIN, J., 19TH MARCH, 1900.

REGINA v. FAWCETT.

Dominion Lands Act Amendment, 1897—Seed grain mortgage—Charge of indebtedness on other lands—Non-compliance with Act.

By an Act to amend the Dominion Lands Act, 60 & 61 V. c. 29, s. 18, it is provided as follows:—In any case in which any settler or purchaser is entitled to the issue of any patent for any land to which the Act relates, but the issue of such patent is delayed because of the liability of such settler or purchaser for the repayment of an advance of seed grain, the Minister may cause such letters patent to issue in favour of the settler or purchaser entitled thereto, and may transmit them to the registrar . . . with a certificate signed by him . . . setting forth the particulars of such liability, with the rate of interest to be paid thereon, the names of the persons liable therefor, and the land to be charged thereby, and the registrar when registering the patent for such land shall make the necessary entries respecting such indebtedness in the proper register or other record book in his office; and thereafter the said indebtedness shall be and remain a charge upon the land until satisfied, etc.

Fawcett having made application for a certificate of title for a quarter section of land, notice of the application was served upon the Minister of the Interior, and he caused a caveat to be filed claiming that the Crown was entitled to a lien upon the lands for seed grain advances, for the repayment of which Fawcett had executed to Her Majesty two mortgages on another quarter section. Fawcett became entitled to the patent for the land in question in 1893, but the issue of it was delayed, because of his liability for the

payment of the seed grain advances, until 6th May, 1899, when the patent was issued and was transmitted to the district registrar for registration, together with certificates which complied in their terms with the provisions of the statute.

Held, that the directions of the section had not been complied with, and that it followed, as a legal consequence, that the non-compliance was fatal to the claim of the Crown.

The patent was registered under the old system of registration, and its registration was completed when the district registrar indorsed the certificate of registration upon it: Registry Act, s. 50.

Then in the "abstract book" the quarter section was entered as having been patented by the Crown to Fawcett, but no entry or reference was made to the certificates which accompanied the patent.

Immediately after the patent was registered an application was made by Fawcett for a certificate of title under the Real Property Act, and the district registrar thereupon made an entry in a book kept for his own convenience, as examiner of titles, of the receipt of the application and the patent, to which there was attached a certificate of seed grain indebtedness. The book could not be considered to be the "proper register or other record book" spoken of in the statute. The right or interest in the Crown cannot arise until those things which Parliament has prescribed for acquiring it have been performed.

The Crown had failed to show that it had the charge or lien on the land that it claimed in the caveat, and the petition should be dismissed.

The respondent Fawcett would be entitled to his costs against the Crown: Rule 277.

As he was indebted to the Crown, the amount of his costs would be set off *pro tanto* against his indebtedness.

Howell, Q.C., and *Mathers*, for the Crown.

Aikins, Q.C., and *Pitblado*, for Fawcett.

BRITISH COLUMBIA.

In the Supreme Court.

[THE JUSTICES IN BANCO, 8TH MAY, 1900.

REGINA v. UNION COLLIERY COMPANY.

Criminal law—Manslaughter—Grevious bodily injury—Indictment of corporation—Punishment—Criminal Code, ss. 191, 192, 213, 252, 639, and 713.

The defendants, a corporation, were indicted for that they unlawfully neglected, without lawful excuse, to take reasonable precautions and to use reasonable care in maintaining a bridge forming part of their railway which was used for hauling coal and carrying passengers, and that on the 17th August, 1898, a locomotive engine and several cars, then being run along said railway and across said bridge, owing to the rotten state of the timbers of the bridge, were precipitated into the valley underneath, thereby causing the death of certain persons. The defendants were found guilty and a fine of $5,000 was inflicted by WALKEM, J., at the trial.

Held, per MCCOLL, C.J., and MARTIN, J., on appeal, affirming the conviction, that such an indictment will lie against a corporation under s. 252 of the Code.

Per DRAKE and IRVING, JJ., that such an indictment will not lie against a corporation.

Sections 191, 192, 213, 252, 639, and 713 of the Code considered.

A corporation cannot be indicted for manslaughter.

Per MCCOLL, C.J.—The words "grievous bodily injury" in s. 252 have no technical meaning, and in their natural sense include injuries resulting in death.

Per DRAKE, J.—The indictment charges the company with the death of certain persons owing to the company's neglect of duty, and is a charge of manslaughter, the punishment of which is a term of imprisonment for life, and because a corporation cannot suffer imprisonment, therefore the punishment laid down in the Code is not applicable to such a body. When death ensues, the offence is no longer "grievous bodily injury," but culpable homicide.

H. A. McLean, for the Crown.

Duff and *Luxton*, for the company.

[DRAKE, J., 6TH JUNE, 1900.

BEAMISH v. WHITEWATER MINES (LIMITED).

Prohibition—County Court — Amount in controversy — Mining claim—Transfer of action.

Motion for prohibition. The plaintiff was a miner in the employment of the defendants, and brought an action in a County Court (mining jurisdiction) for $2,190 damages for personal injuries. The defendants moved for prohibition, on the ground that the amount sued for was beyond the jurisdiction of the County Courts.

Held, that the action was properly brought in the County Court, under s. 117, s.-s. 2, of the Mineral Act, R. S. B. C. 1897 c. 135.

The motion was dismissed with costs, but on the defendants' application an order was made transferring the action to the Supreme Court; costs of such transfer to be costs in the cause.

Bodwell, Q.C., for the motion.

Cassidy, contra.

NORTH-WEST TERRITORIES

In the Supreme Court.

[ROULEAU, J., DECEMBER, 1899.

SHARPLES v. POWELL.

Small debt procedure—Writ of summons—Place of issue.

In a small debt action, where the cause of action arises within the district of the deputy clerk, and the defendant resides within the district, the writ of summons must be issued out of the office of the deputy clerk of the district, and a writ issued by the chief clerk of the judicial district from his own office will be set aside as irregular.

[SCOTT, J., MARCH, 1900.

IMPERIAL BANK v. HULL.

Third party notice—Service out of the jurisdiction—Partners carrying on business out of the jurisdiction.

After service of the writ, the defendant applied for and obtained, under Rule 60 of the Judicature Ordinance, 1898, leave to issue a third party notice claiming contribution from the Parsons Produce Company, and to serve the notice upon the company at the city of Winnipeg, in the province of Manitoba. These proposed third parties were not an incorporated company, but were a partnership consisting of several partners, and were not carrying on business within the North-West Territories, but at the city of Winnipeg, in the province of Manitoba, under the firm name of the Parsons Produce Company. The notice was directed to them under that name, and not to the several partners as individuals, and was served upon a servant of the partnership, viz., their bookkeeper, at their Winnipeg office, and not upon any of the partners individually.

Held, that the order giving leave to issue the third party notice to a firm outside the jurisdiction, in the firm's name, was not authorized under Rule 60; (2) that in any case the notice should have been personally served upon the members of the firm.

Muir, Q.C., for the third parties.

R. B. Bennett, for the defendant.

[4TH MAY, 1900.

McNEILLY v. BEATTIE.

Small debt procedure—Meaning of "debt"—Claim for wrongful dismissal.

A claim by a servant hired by the month against his master for wrongful dismissal in the middle of the month, is not a claim or demand for debt within the terms of s. 602 of the Judicature Ordinance, and proceedings to recover the same cannot be taken under the small debt procedure.

Where, however, the plaintiff has brought an action for such a claim under the small debt procedure, and it appears that the defendant has not been in any way prejudiced, the Court will, under the power given by s. 538 of the Judicature Ordinance, direct that the writ of summons and the service thereof, shall stand, but that the action shall continue as an action under the large debt procedure.

Supreme Court of Canada.

ONTARIO.] [12TH JUNE, 1900.

MATHESON v. THOMSON.

Contract—Sale of lumber—Inspection.

A contract for the sale of lumber was made wholly by correspondence, and the letter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here" (at Windsor), "by a competent inspector to be agreed upon between buyer and seller, and his inspection to be final."

Held, reversing the judgment of the Court of Appeal, that it was not essential for the parties to agree upon an inspector before the inspection was begun; and a person chosen by the buyer having inspected the lumber, and before his work was completed the seller having agreed to accept him as inspector, the contract was satisfied and the inspection final and binding on both parties.

Riddell, Q.C., for the appellants.

Aylesworth, Q.C., and *W. A. Smith,* for the respondents.

BARCLAY v. LAKE ERIE AND DETROIT RIVER R. W. CO.

Railways—Shunting cars—Warning—Proof of negligence—Jury.

B., in driving towards his home on a night in September, had to cross a railway track between 9 and 10 o'clock, on a level crossing near a station. Shortly before this a train had arrived from the west which had to be turned for a trip back in the same direction, and also to pick up a passenger car on a siding. After some switching the train was made

up, and, just before coming to the level crossing, the engine and tender were uncoupled from the cars to proceed to the round house. B. saw the engine pass, but apparently failed to perceive the cars, and started to cross, when he was struck by the latter and killed. There was no warning of the approach of the cars which struck him. In an action by his widow under Lord Campbell's Act the jury found that the railway company were guilty of negligence, and that a man should have been on the crossing when making the switch to warn the public. A verdict for the plaintiff was sustained by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal, GWYNNE, J., dissenting, that it was properly left to the jury to determine whether or not, under the special circumstances, it was necessary for the company to take greater precautions than they did, and to be much more careful than in ordinary cases where these conditions did not exist; and that the case did not raise the question of the jury's right to determine whether or not a railway company could be compelled to place watchmen upon level highway crossings to warn persons about to cross the line.

Riddell, Q.C., and *J. H. Coburn*, for the appellants.

M. Wilson, Q.C., and *Gundy*, for the respondent.

BRITISH COLUMBIA.]

KIRK v. KIRKLAND.

Registry laws—Registration of tax deed—Certificate of title—Priority over earlier certificate—R. S. B. C. c. 111.

Section 13 of the British Columbia Land Registry Act, R. S. B. C. c. 111, provides that a person claiming ownership in fee of land may apply for registration thereof, and the Registrar, on being satisfied, after examination of the title deeds, that a *prima facie* case is established, shall register the title in the "Register of Absolute Fees." Section 19, which authorizes the Registrar to issue a certificate of title to the person so registering, contains this provision: "Every certificate of title shall be received as *prima facie* evidence

in all Courts of justice in the Province, of the particulars therein set forth." And by s. 23: "The registered owner of an absolute fee shall be deemed to be the *prima facie* owner of the land described or referred to in the register for such an estate of freehold as he may possess" . . . .

Held, affirming the judgment of the Supreme Court of British Columbia, 7 Brit. Col. L. R. 12, that a certificate of title issued on registration of a deed from the assessor of taxes to a purchaser at a tax sale does not of itself oust the prior registered owner of the land described in the register, but the holder must prove that all the statutory provisions to authorize a sale for taxes had been complied with.

Gormully, Q.C., and *Orde*, for the appellant.

J. Travers Lewis, for the respondent.

YUKON TERRITORY.]

O'BRIEN v. ALLEN.

Constitutional law—Government of Yukon—Franchise over Dominion lands —Exaction of tolls.

In 1898 the Executive Government of the Yukon Territory granted to the appellants the privilege of building a toll tramway or waggon road, or partly both, between certain points in the Territory, which road, when constructed, passed largely through Dominion lands. The respondents, who were in the express and carrying trade, being obliged to take freight over said tramway, had to pay a toll of one-half cent per pound thereon, and brought an action against the appellants for repayment of the amount so exacted, claiming that they had a right to the free use of these public lands. The action was tried before DUGAS, J., who held that, as the franchise of the appellants had not been confirmed by the Interior Department, which had control over and management of Dominion lands, the appellants had no right to exact the tolls.

Held, reversing this judgment, that the Commissioners in Council of the Yukon had the same powers to make laws for the government of the Territory as were possessed by the Lieutenant-Governor and Legislature of the North-West

Territories, and substantially the same as the Executive in the other Provinces; that the building and operating of tramways is wholly a matter of provincial jurisdiction; and that the ownership of the soil could only be brought in question in this case by the Crown.

Aylesworth, Q.C., and *H. B. McGiverin*, for the appellants.

The appeal was prosecuted *ex parte*.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [15TH MAY, 1900.

BOLLANDER v. CITY OF OTTAWA.

Municipal corporations—By-law—Markets—Auctioneer—"Regulating and governing"—R. S. O. c. 223, ss. 580, 583 (2.)

Neither under s. 580, nor under s. 583 (2), of the Municipal Act, R. S. O. c. 223, can a municipal corporation prohibit an auctioneer from carrying on his business in the public markets of the city in respect of any commodities which may properly be sold there.

Judgment of a Divisional Court, 30 O. R. 7, 18 Occ. N. 401, affirmed.

Leighton McCarthy, for the appellants.

G. F. Henderson, for the respondent.

ARMOUR, C.J.] [7TH MAY, 1900

UFFNER v. LEWIS.

BOYS' HOME OF HAMILTON v. LEWIS.

Executors and administrators—Trustees—Distribution of estate—Unpaid legatee—Contribution by other legatees—Limitation of actions.

Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an administration action instituted by other residuary legatees in

which they have not been added as parties, and of which they have received no notice. The judgment in such an action, however, enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations.

Per MACLENNAN, J.A.—In the absence of reasonable efforts by the executors of an estate to discover the whereabouts of persons entitled to share in the residue, they are not protected if they, even under the order and direction of the Court, distribute the residue among the other persons entitled.

Per CURIAM.—Persons who have received a share of the residue under such circumstances must refund for the benefit of the persons whose claims have been ignored the amount received in excess of the sum payable if the division had been properly made.

Judgment of ARMOUR, C.J., affirmed.

Armour, Q.C., and *W. Bell*, for the appellants Lewis and Morgan.

Teetzel, Q.C., for the appellants the Boys' Home.

D'Arcy Tate, for the respondents.

MEREDITH, C.J.] [15TH MAY, 1900.

ECKARDT v. LANCASHIRE INSURANCE CO.

Fire insurance—Variation from statuary conditions—Co-insurance condition —"Not just and reasonable"—R. S. O. c. 203, s. 171.

Per OSLER, MACLENNAN, and LISTER, JJ.A.—The condition known as the "co-insurance condition" cannot be held to be "not just and reasonable" within the meaning of s. 171 of the Ontario Insurance Act, R. S. O. c. 203, when the premium is reduced in consideration of its insertion.

Per BURTON, C.J.O., and MOSS, J.A.—In the absence of evidence that the insured, in consideration of the reduced premium, elected to take a policy with this condition, it must be held to be prima facie "not just and reasonable," and not binding upon him.

In the result the judgment of MEREDITH, C.J., 29 O. R. 695, 18 Occ. N. 361, was affirmed.

Lash, Q.C., and *A. W. Anglin*, for the appellants.

Osler, Q.C., and *Creelman*, Q.C., for the respondents.

ONTARIO LANTERN CO. v. HAMILTON BRASS MANUFACTURING CO.

Contract—Manufacture and sale of chattels—Breach—Damages.

Five days after making a contract with the plaintiffs for the manufacture by them of a large number of shells for electric light lamps, to be delivered monthly for a period of twenty months, the defendants notified the plaintiffs that they would not carry out the contract.

Held, that though the plaintiffs were entitled to bring an action at once to recover damages, they should not be allowed as damages the full amount of their expected profit, but that allowance should be made for the many contingencies which might have happened before the time for fulfilment.

The Court, after stating the general principles and pointing out some of the contingencies, reduced the amount of damages allowed by MEREDITH, C.J.

Lynch-Staunton, Q.C., for the appellants.

D'Arcy Tate, for the respondents.

ROBERTSON, J.]

SNIDER v. McKELVEY.

Contract—Medical practitioner—Agreement not to practise—Breach of—Damages—Injunction.

By an agreement under seal the defendant sold to the plaintiff a house and the good will of his medical practice for $2,100, and the defendant "bound himself in the sum of $400 to be paid to the (plaintiff), in case the (defendant) shall set up or locate himself in the practice of medicine or surgery within the space of five years from the date hereof within a radius of five miles from the said village."

Held, that the sum of $400 was payable as liquidated damages, and that the plaintiff, on the breach of the agreement, was entitled to that sum or to an injunction, but not to both.

Judgment of ROBERTSON, J., 31 O. R. 91, 19 Occ. N. 317, varied.

Garrow, Q.C., for the appellant.

W. M. Sinclair, for the respondent.

CONFEDERATION LIFE ASSOCIATION v. LABATT.

Sale of goods—Want of title—Damages.

The purchaser of a chattel is entitled to recover from the vendor upon failure of title, the value of the chattel, and not merely the amount paid by him to the vendor.

Judgment of ROBERTSON, J., reversed in part.

Shepley, Q.C., and *W. H. Irving*, for the appellants.

Aylesworth, Q.C., and *Rowell*, for the respondent Labatt.

Snow, for the plaintiffs.

FALCONBRIDGE, J.]

WILSON v. OWEN SOUND PORTLAND CEMENT CO.

Master and servant—Workmen's Compensation for Injuries Act—Defect in machinery—Want of notice of accident—R. S. O. c. 160, ss. 3 (1), 13, 14.

A machine perfect in itself is, if applied to some purpose for which it is unfitted, defective within the meaning of s. 3 (1) of the Workmen's Compensation for Injuries Act, R. S. O. c. 160.

To state in the defence that notice of the accident has not been given, and that the defendants intend to rely on that defence, is not sufficient. Formal notice must be given in accordance with the provisions of s. 14.

Cavanagh v. *Park*, 23 A. R. 715, applied.

Judgment of FALCONBRIDGE, J., affirmed.

J. M. Kilbourn, for the appellants.

A. G. Mackay, for the respondents.

INCE v. CITY OF TORONTO.

Municipal corporations—Highways—Damages—Ice—Negligence—"Gross negligence"—R. S. O. c. 223, s. 606 (2).

"Gross negligence," in s. 606 (2) of the Municipal Act, R. S. O. c. 223, means at the least "great negligence," and when it is attempted to make a municipal corporation responsible in damages under that sub-section for an accident caused by ice on a sidewalk, it must be shown that the sidewalk was allowed to remain in a dangerous condition for an unreasonable time.

If the sidewalk has been constructed in accordance with the plans of competent engineers and is in good repair, the possibility of an improved or less dangerous plan of construction is not an element to be considered in deciding the question of the municipality's gross negligence.

Where there was a sudden change in temperature about six in the morning, and ice then formed on the sidewalk in question, it was held that the municipality, in the absence of actual notice of its dangerous condition, were not liable in damages for an accident which happened about eleven o'clock on the same morning.

Judgment of FALCONBRIDGE, J., reversed.

Fullerton, Q.C., and *W. C. Chisholm*, for the appellants.

Aylesworth, Q.C., and *C. A. Moss*, for the respondent.

MACMAHON, J.]

UNION BANK v. CODE.

UNION BANK v. MORRIS.

Company—Shares—Issue at a discount—Payment for services—Transfer—Certificate—R. S. O. c. 119, ss. 27, 48, 55.

Where shares in a company incorporated under the Dominion Joint Stock Companies Act, R. S. C. c. 119, were issued as paid up shares, but part of the alleged payment consisted of an amount allowed by the company to the shareholders for services which by a contemporaneous agreement they agreed to render to the company, it was held,

in a judgment creditor's action, that the shares, to the extent of the amount so allowed, must be treated as unpaid shares.

Judgment of MACMAHON, J., affirmed.

Where, without any transfer being executed, certificates were, on the application of the transferor, issued by the company to the alleged transferee, it was held, having regard to the Act and the by-laws of the company, that the alleged transfer was ineffectual and that the transferor remained liable to the company's creditors.

Judgment of MACMAHON, J., reversed.

D. W. Saunders and *Cattanach*, for the plaintiffs.

Watson, Q.C., and *Noble*, for the defendants.

STREET, J.]

CLIFTON v. CRAWFORD.

Will—Construction—Legacy—Survivorship—Accruer.

A testator gave a legacy of $500 to each of three grandchildren, William, Thomas, and Zilla, and directed: "The said moneys so bequeathed to be kept invested by my executors, and the same with accrued interest to be paid over to the said William and Thomas on their attaining their majority, and the said legacy to my said granddaughter Zilla to be paid to her with the interest accrued thereon on her attaining her majority or on her marriage, whichever event shall first happen. In case of the death of any one of my said grandchildren, the bequests and legacies to them in this my will contained shall be divided among and go to the survivor or survivors of them share and share alike." William died under age and unmarried, and then Zilla died under age and unmarried:—

Held, that the legacies to William and Zilla became divested by their death before the time for payment, and became vested in Thomas, and that Zilla's representatives were not entitled to one-half of William's legacy, which vested in her contingently upon his predeceasing her.

Judgment of STREET, J., reversed.

Justin, for the appellants.

B. N. Davis and *J. E. Cook*, for the respondents.

McDOUGALL, Co.J.]

GEARING v. ROBINSON.

Mechanics' lien—"Owner"—R. S. O. c. 153, s. 2, s.-s. 3.

A person is not an "owner," within the meaning of s.-s. 3 of s. 2 of the Mechanics' Lien Act, R. S. O. c. 153, and as such liable in mechanics' lien proceedings for work done or materials placed upon land in which he has an interest, unless there is something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged. Mere knowledge of, or consent to, the work being done or the materials being supplied, is not enough; there must be a request, either express, or by implication from circumstances, to give rise to the lien.

Judgment of McDOUGALL, Co.J., reversed.

Shepley, Q.C., for the appellants.

DuVernet and *D. C. Ross*, for the respondent the plaintiff.

LeVesconte, for the respondents M. and M. S. Robinson.

OFFICIAL ARBITRATOR.]

In re McLELLAN AND TOWNSHIP OF CHINGUACOUSY.

Ditches and Watercourses Act—Municipal corporations—Compensation—"Owner"—Highways—Negligence.

A municipal corporation is an "owner," within the meaning of the Ditches and Watercourses Act, of highways under its jurisdiction, and as such may initiate proceedings under that Act.

Where it has, pursuant to an award in proceedings initiated by it under that Act, constructed, without negligence, a drain from a highway to a river through an adjoining owner's land, it is not liable to make compensation

under the Municipal Act to that adjoining proprietor on the ground that his land has been injuriously affected by the drain.

Judgment of the Official Arbitrator reversed.

Shepley, Q.C., and *A. McKechnie*, for the appellants.

T. J. Blain and *D. O. Cameron*, for the respondent.

HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., MEREDITH, J., 12TH JUNE, 1900.

HOLMES v. TOWN OF GODERICH.

Contract—Delivery of goods—Place—"At," meaning of.

The plaintiff, tendering for a supply of coal for the defendants' waterworks, wrote, "I will deliver in bond into the coal shed at pumping station or grounds adjacent thereto where directed by you, one thousand tons," etc. The plaintiff tender being accepted, a contract was drawn up by which he agreed to deliver *at* the coal shed," etc.

The defendants refused to accept or pay for the greater part of the coal furnished by the plaintiff, because it was not delivered to them at the place mentioned in the contract, i.e., it was not put into the shed by the plaintiff, but left at the dock near the pumping station.

ARMOUR, C.J., who tried the action, found that all the coal was delivered "at the coal shed" within the intent and meaning of the contract, and *held*, that the word "at," as used in the contract, signified "near to," and that was the primary idea conveyed by this word, citing Webster's Dictionary, tit, "at;" *Mohawk Co.* v. *Utica and Schenectady Co.*, 6 Paige 554; *Dunkham* v. *Smith*, 5 T. B. Monroe 372; *State* v. *Cox*, 9 Vroom 302; *Homer* v. *Homer*, 8 Ch. D. 758; *Price* v. *Bala Co.*, 50 L. T. N. S. 787.

Held, by a Divisional Court, upon the evidence, reversing the finding of ARMOUR, C.J., that the portion of the coal in question was not delivered at the place designated by the contract.

Per BOYD, C.—"At" means rather within a place than without; "at" the coal shed means "in" or "in close proximity to" the shed. The cases referred to as to the meaning of the word "at" merely shew its meaning under the circumstances of each case. Such words take their colouring from their circumstances and situation.

E. L. Dickenson, for the plaintiff.

Garrow, Q.C., for the defendants.

[14TH JUNE, 1900.

KELLY v. DAVIDSON.

Master and servant—Foreman—Negligence—Evidence—Finding of jury.

AN appeal by the plaintiff from the decision of MAC-*Mahon,* J., *ante* 121, was allowed with costs, and judgment ordered for the plaintiff for $500, the damages assessed by the jury, with costs, the Court holding that there was evidence sufficient to support the finding of the jury in answer to the third question, and that finding could not be interfered with or disregarded.

H. E. Irwin, for the plaintiff.

Clute, Q.C., and *A. R. Clute,* for the defendant.

[15TH JUNE, 1900.

CAMERON v. OTTAWA ELECTRIC R. W. CO.

Trial—Jury—Bias of juror—Relationship to party—Deaf juror—Juror not in panel—New trial—Costs.

The plaintiff was injured in September, 1898, in alighting from a car of the defendants, by reason of a sudden jerk. There was conflicting evidence as to whether the car was in motion when the plaintiff got off. There was an alarm that the car was on fire, which caused the plaintiff to endeavour to alight. She was thrown to the ground and her arm severely hurt. At the trial of an action to recover damages for her injuries, a verdict was given for the defendants. The plaintiff asked for a new trial on the ground

that the verdict was against evidence, and also on the ground that the foreman of the jury was formerly a shareholder in the defendant company and connected by marriage with persons now largely interested in it; also that another juryman was hard of hearing and did not hear the evidence of the plaintiff's witnesses; and also that a third juryman was not in the panel at all.

Held, that it was essential to the maintenance of public confidence in the jury system, not only that the trial should be fairly conducted, but that it should appear to the parties and those interested to be fairly conducted, and that element was lacking in the present case.

A juror with pecuniary or personal interest in the case of either litigant would do well to disclose this fact at the outset; then, if no objection is made, he can be sworn and try the case without risk of suspicion. In the present conjunction of errors, it was impossible to say that the result had not been affected by the composition of the jury. The trial was not satisfactorily conducted, in regard to the presence on the jury of the three jurymen to whom objection had since been made, and while the plaintiff was not entitled to relief as a matter of right, the discretion of the Court might well be exercised to permit her to have a new trial on payment of costs.

Order accordingly, MEREDITH, J., neither concurring nor dissenting.

Aylesworth, Q.C., and *G. F. Henderson,* for the plaintiff.

Riddell, Q.C., and *H. E. Rose,* for the defendants.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 19TH JUNE, 1900.

BEAM v. BEATTY.

Arrest—Application for discharge—Onus—Intent to defraud—Former absconding.

Upon an application by the defendant for his discharge from arrest under a *ca. re.*, he did not dispute the existence of the debt alleged by the plaintiff, nor that he was about to leave the country without paying or providing for it, but

contended that he was not about to quit the Province with intent to defraud.

The debt sued for was contracted in 1893, and arose out of an irrigation scheme, in which the plaintiff was induced by the defendant to purchase an interest. It was alleged, but disputed, that this was a fraudulent scheme. It was also alleged and denied that the defendant in 1893 absconded from this Province to the United States of America. The defendant was a citizen of the United States, and was in Ontario in 1893, and again in 1900, when arrested, for temporary business purposes. It was not shewn that he ever had any property in this Province, nor that he took any away with him in 1893, nor that at the time of his arrest he had any in his hands or under his control. The evidence did not shew that he was at the time of the arrest about to leave the Province hurriedly, but that he intended to stay till he had finished the business which brought him to the Province, and then return to his own country as of course.

Held, FERGUSON, J., dissenting, that the Court could not, upon this application, try the question whether the defendant did or did not abscond in 1893; that the onus was upon the plaintiff to make out the fraudulent intent in the departure now proposed, by more than mere suspicion; and that, upon all the facts and merits disclosed, the arrest could not be maintained.

Kersterman v. *McLellan*, 10 P. R. 122, distinguished.

Per FERGUSON, J.—Upon this application the burden was upon the applicant of shewing that, upon the facts as they actually existed, the arrest should not have been ordered or made. Before and at the time of his arrest the defendant was not in a like position as to residence as was the defendant in *Clement* v. *Kerby*, 7 P. R. 103, or at all in the position of a mere traveller or visitor found in this country, but was living here and transacting important business here. His former conduct in respect of the same debt was also to be considered on the question of intent to defraud; and, having regard to that and all the facts appearing, the defendant was about to leave this country with

intent never to pay this debt, or presumably any of the debts that he owed in this country, which was the same as an intent to defraud.

A. C. McMaster, for the plaintiff.

Masten, for the defendant.

[ARMOUR, C.J., STREET, J., 13TH JUNE, 1900.

REGINA v. ROCHE.

Municipal corporations—By-law—Transient traders—Conviction—Penalty—Costs—Imprisonment—Distress.

The defendant was convicted before a justice of the peace for that she did on a certain day, and at other times since, occupy premises in the town of B., and did carry on business on said premises by selling dry-goods, she not being entered on the assessment roll of the town for income or personal property for the current year, and not having a transient trader's license to do business in the town, as required by a certain by-law of the town; and was adjudged for her offence to forfeit and pay the sum of $50 (to be applied on taxes to become due), to be paid and applied according to law, and also to pay to the justice the sum of $11.45 for his costs in that behalf; and if these sums were not paid forthwith, she was adjudged to be imprisoned.

The first clause of the by-law provided that every transient trader who occupied premises in the municipality, and who was not entered in the assessment roll, and who might offer goods or merchandise for sale, should take out a license from the municipality. The second clause provided that every other person who occupied premises in the municipality for a temporary period should take out a license. The eighth clause provided for the imposition of a penalty for a breach of any of the provisions of the by-law, and that in default of payment of the penalty and costs, the same should be levied by distress, and authorized imprisonment in default of distress.

Held, that the defendant was not brought within either the first or second clause of the by-law, as it was not alleged

or charged that she was a transient trader or that she occupied premises in the municipality for a temporary period; and these omissions were fatal to the conviction.

Regina v. *Caton*, 16 O. R. 11, followed.

Held, also, that the conviction was open to objection because of the application of the penalty, the award of the costs to the justice, instead of to the informant, and the award of imprisonment upon default in payment of the penalty.

The conviction was quashed, and costs were given against the informant.

F. J. Roche, for the defendant.

G. W. Lount, for the informant.

IN CHAMBERS.

[ROSE, J., 18TH JUNE, 1900.

In re SEBERT v. HODGSON.

Prohibition—Division Court—Jurisdiction—Wager—Amendment.

Motion by the defendant for prohibition to the 3rd Division Court in the county of Ontario.

The particulars annexed to the summons were: "To amount of a wager won by the plaintiff, $20." The defendant disputed the jurisdiction. By s. 71 of the Division Courts Act, R. S. O. c. 60, the Division Courts shall not have jurisdiction in (1) actions for any gambling debt.

It appeared that a bet of $10 was made by the plaintiff with the defendant on the result of an election, and the defendant, by agreement, became the holder of the plaintiff's stake and his own. The plaintiff claimed both stakes as the result of the election, but the defendant refused to pay.

At the trial the plaintiff obtained leave to amend the particulars so as to claim a return of his own $10 as money paid to the defendant for the plaintiff's use. The Judge, after hearing all the evidence, found that there had not been a wager or bet, and gave judgment for the plaintiff for $10.

Held, that there was power to amend, and this Court could not interfere by prohibition.

R. McKay, for the defendant.

W. E. Middleton, for the plaintiff.

[14TH JUNE, 1900.

PRITCHARD v. PATTISON.

Evidence—Motion—Security for costs—Nominal plaintiff—Insolvency.

The plaintiff, being examined by the defendant as a witness upon a motion made by the defendant to set aside the proceedings and dismiss the action or for security for costs, on the ground that the plaintiff had no interest in the company on behalf of whose shareholders as well as himself he was suing, was asked what means he had of satisfying the costs in the action.

Held, that the defendant could not interrogate the plaintiff as to his financial position until, at least, a *prima facie* case had been made out that he was only the nominal, and not the real and substantial, plaintiff; and the evidence given upon the motion before the examination of the plaintiff shewed that he had a substantial interest.

F. J. Roche, for the plaintiff.

P. H. Drayton, for the defendant.

[17TH JUNE, 1900.

In re VERNON.

Lunatic—Maintenance—Moneys on deposit—Attachment by creditor—Payment into Court.

A motion by the committee of a lunatic for an order directing the Canadian Bank of Commerce to pay into Court, for the purpose of application for the lunatic's benefit, certain moneys deposited to the credit of the lunatic.

The moneys had been attached by a creditor of the lunatic, to whom notice of this application was given.

J. W. McCullough, for the committee.

J. D. Montgomery, for the creditor, opposed the application.

J. F. Edgar, for the Inspector of Prisons and Public Charities.

ROSE, J.—In *Wood* v. *Joselin*, 18 A. R. at p. 60, Mr. Justice Osler said: "It is clear that the service of the garnishee summons does not create, as between garnishor and garnishee, any debt either at law or in equity, and does not operate to any extent as an assignment or transfer of the debt to the garnishor: *Chatterton* v. *Watney*, 17 Ch. D. 259; *In re Combined Weighing and Advertising Machine Co.*, 43 Ch. D. 99." See also Wade on Attachment, vol. 2, sec. 325.

The claim of the creditor to have his debt paid out of the moneys in the hands of the Canadian Bank of Commerce fails. These moneys must be paid into Court for the maintenance of the lunatic, without prejudice to such priority as this creditor may have obtained over any other creditors as to any surplus which may remain if the lunatic should die or recover before the fund is exhausted.

The creditor must pay the costs of the inspector and of the committee.

In the General Sessions of the Peace for the County of York.

[McDOUGALL, Co.J., 20TH JUNE, 1900.

REGINA v. VALLEAU.

Practising medicine—Ontario Medical Act—Non-registration—What constitutes "practising."

Appeal from a conviction for practising medicine without registration.

Curry, Q.C., for the Crown.

Geary, for the defendant.

McDOUGALL, Co.J.—The defendant appeals from a conviction for an alleged contravention of the Medical Act, by

practising medicine without being duly registered. The defendant gave no medicine or drug, nor did he prescribe any. His methods appear to have been to question people who applied to him as to some of their symptoms, but he professed to cure only by rubbing with the hands and by suggestion that they were cured. The patient frequently professes to be relieved or to feel better as the result of this manipulation or the suggestion, or both. It might well happen that in a case of nervous disease, which often arises from mental conditions, the mere suggestion that a cure had been effected, especially in a case where the patient had been led to hope for alleviation by the reported success of the operator, would act as effectively as the administration of drugs. The defendant made a charge for each treatment given by him. He advertised his alleged marvellous cure, and many people visited him. Amongst them the complainant and a witness named Duncan, both of whom gave evidence before the magistrate. The complainant is the prosecutor employed by the Ontario Medical Council.

At the argument before me it was agreed that the evidence taken before the magistrate should be the sole material to be considered on the appeal. Mr. Curry contended that if the defendant had omitted to question the patient as to his symptoms, and had only rubbed the patient and told him he was cured, such action, even if he charged for the rubbing or the time occupied, would not amount to an offence against the Act. It is manifest that if rubbing a patient for hire, without more, amounted to a practising of medicine, every masseur could be prevented from following his calling, unless he was duly registered as a medical practitioner. If Mr. Curry's contention be correct, such masseur would become liable to the penalties of the Act if he overstepped the line by asking his patient where his aches or pains lay, or questioned him as to his symptoms, even with the object of treating the patient more intelligently and successfully by the application of his physical treatment. Mr. Curry contends that there was an offence committed the moment the defendant catechised the would-be patient and asked him if he had some stomach or lung trouble or any trouble in his head. This alleged effort to diagnose, he says,

was a practising of medicine, bringing the culprit within the penal clauses of the Act. In other words, if a masseur employed to rub you asks you where your pain is, or inquires if you have a pain in any part of your frame, which you have failed to voluntary disclose, such indiscreet curiosity would bring the masseur within the prohibition intended by the Act.

I am of opinion from the facts disclosed in evidence in this case that there was no practising of medicine. No medicine was prescribed, nor any remedy suggested to be taken. From what the patient told the defendant, the defendant said: "There is nothing the matter with you but a little stomach trouble, and that I can cure by rubbing with the hand." He told the witness Duncan, so Rose, the complainant swears, "that he cured by animal magnetism or electricity passing from his body to the person who is sick." Rose says that after this explanation, "the defendant rubbed his hands together and then applied them for 15 or 20 minutes to Duncan's body. He then told Duncan he was cured and he was to tell everybody who asked him that he was cured." He says again: "He did not prescribe any medicine for Duncan, nor give any medicine of any kind. He told Duncan to use good, wholesome food, to get lots of fresh air, and drink water." The witness Duncan's evidence is to the same effect as Rose's in every particular.

Diagnosing only, or professing to diagnose, without prescribing a remedy or medicine, has never yet been held to be a practising of medicine. In *Regina* v. *Howarth*, 24 O. R. 51, and *Regina* v. *Coulson*, 27 O. R. 59, it was the prescribing of medicine or drugs after questioning the would-be purchaser as to symptoms that was held to amount to a practising of medicine. Any man may go into a chemist shop complaining of feeling unwell and describe his symptoms in detail, even in answer to questions by the chemist; yet, if the chemist does not suggest or recommend a particular drug or remedy appropriate to the supposed physical trouble or disturbance, there would be no practising of medicine. A person, in order to render himself liable for practising medicine under the Medical Act, must have, for gain, prescribed or recommended for trial a particular remedy selected by

himself as appropriate to the symptoms described by the patient. If the patient selects a remedy for himself, making up his own mind as to what he ought to take, there is no offence. A druggist is allowed, it appears, to state fully the qualities and properties of two or more remedies, and even to say which in his opinion is the better remedy or compound, but he must stop short of recommending which remedy the patient had better take for his alleged trouble or complaint: *Regina* v. *Coulson*, supra.

I dispose of this appeal upon the short ground that no medicine was prescribed. Manual manipulation of a patient for reward with the object of curing disease, even where it follows upon a close inquiry from the patient as to his symptoms, is not, in my opinion, a practising of medicine within either the letter or spirit of the Ontario Medical Act.

The appeal will be allowed and the conviction will be quashed with costs.

In the County Court of the County of York.

[McDougall, Co.J., 20th June, 1900.

VERNEY v. GUTHRIE.

Attachment of debts—Salary of police officer—Payment before attachment—Cheque handed to police inspector—Agency—Stopping payment.

A garnishing application.

D. T. Symons, for the judgment creditor.

J. W. McCullough, for the judgment debtor.

Mr. Fulton (*Thomas Caswell*), for the garnishees.

McDougall, Co.J.—Both of the parties to this application are members of the Toronto police force. The defendant is indebted to the plaintiff in the amount of an unsatisfied judgment recovered in the County Court.

On the 1st June the plaintiff took out a garnishee or attaching order, and upon the same day duly served the order upon the corporation of the city of Toronto, seeking to attach the salary payable by the city to the defendant for his services as police officer for the month of May, 1900.

The facts relating to the position of the city and the defendant with respect to his salary at the time when the attaching order was served are not disputed between the parties. They may be summarized as follows:—Police officers are appointed and controlled by the board of police commissioners. They are the employees of the board, and are not officers and employees, in the legal sense, of the city *Kelly* v. *Barton*, 26 O. R. 623. By s. 492 of the Municipal Act, the council are directed by the legislature to appropriate and pay such remuneration for and to the respective members of the force as may be required by the board of commissioners of police, etc., etc. The practice adopted for many years by the commissioners in reference to the payment of their men has been to furnish the city treasurer a few days before the end of each month with a certified list or pay-roll showing the amount payable, to each officer then serving the board, for the current month. Upon the receipt of this list the city treasurer prepares a separate cheque for the amount shown to be payable to each officer, as indicated by such list. Each cheque is made payable to the officer, by name, or his order, whose monthly salary it represents. The cheques, numbering some 260 or 270, are then arranged in seven or eight separate lots. . Each lot consists of the cheques payable to officers serving in a police district. The cheques so arranged are then handed to the several inspectors or officers in charge of police districts. The inspector takes the cheques belonging to the men serving in his district to his station, and there distributes them to the men entitled, taking each officer's signature upon a sheet acknowledging the receipt of his monthly cheque or pay. The defendant serves in No. 2 division, and the cheques for the men in No. 2 for the May salaries were in this instance handed by the city treasurer's clerk to Sergeant McClelland, orderly room clerk of the commissioners, to be by him transmitted to No. 2 division. Sergeant McClelland gave them to Inspector Stephen, the officer in charge of No. 2, for distribution amongst his men, of whom Guthrie, the defendant, was one. The cheques for the No. 2 men were delivered by the treasurer's officer to Sergeant McClelland at police headquarters at 9 a.m. on the 1st June. The attaching order was issued at about 10 a.m. on the 1st June,

and served a few minutes later upon the garnishees, the corporation of Toronto. Apparently, because he found that the cheques had already reached headquarters about an hour before the time of service, and had learned that the defendant's cheque had reached Inspector's Stephen's hands, the plaintiff's solicitor caused that officer also to be served with a copy of the attaching order issued against the city. Such service took place before Stephen had actually handed over to the defendant his cheque, representing the salary now sought to be garnished. Inspector Stephen was not a party, named in the attaching order.

Upon this state of facts it is contended that the city was indebted at the time of the service upon it of the attaching order to the defendant Guthrie in the amount of his May pay or salary, $58.90. The city treasurer files an affidavit in which he says that at the time of service of the order there was not a debt due or owing to the defendant, and further that at the time of such service the defendant's cheque had been handed to Inspector Stephen for delivery to the defendant. As I have mentioned earlier, the cheque had been handed first by the treasurer's clerk to McClelland, the orderly room clerk, and later given by McClelland to Stephen to be handed to the defendant.

The plaintiff's counsel contends that Stephen was the agent of the city to hand the cheque to the defendant, and, as Stephen had been served with a copy of the attaching order before he had parted with the custody of the cheque, the cheque is still in Stephen's hands, as the city's agent, pending the decision upon this application. It has in fact never actually reached the defendant, and consequently it is contended that whatever has been done does not amount to payment by the city of their indebtedness to the defendant; and therefore at the date and time of service, it is urged, the garnishees were and still are indebted to the defendant in the sum of $58.90.

It is conceded that if the cheque had actually got into Guthrie's hands, the present application must fail. It is also conceded that if Inspector Stephen is to be considered the agent of the defendant to receive his cheque for him, such a conclusion would be equally fatal to the plaintiff's

application. This would also be the case if Stephen was the mutual agent of the city and Guthrie:. *Bridges* v. *Garrel*, L. R. 5 C. P. 451.

It is quite clear to me from the facts above stated that Stephen was not in any sense in this case the agent of the city. He got no instructions from them, nor did he receive the cheques from their office for distribution. A Mr. Barber, the treasurer's clerk, swears that he gave the cheques to Sergeant McClelland for the policemen in No. 2 division. It is admitted that it was McClelland who handed them to Stephen. If not the agent of the city, was Stephen the agent of the defendant to receive his cheque? It appears to me that, strictly speaking, each policeman had the right to apply at the city treasurer's office for his individual cheque. The men of each division, however, for some years past, instead of applying personally to the city treasurer, have sanctioned a practice which was more convenient to all parties, namely, that the officers in charge of their respective divisions should receive their cheques for them and bring them to the station, where as they came on or off duty they could apply for and get them. It is true that upon receiving their cheque they sign a receipt or pay-roll presented to them by the inspector, acknowledging the receipt of their month's salary. There is nothing to show, however, on the material before me, that the city required this formality, for each cheque on its face purported to be for the current month's salary of the individual, and had to be indorsed by the payee before it could be cashed. Such indorsement would constitute it a voucher showing payment to the payee or his order of the amount of cash represented by the cheque. The city was the paymaster, not the board of police commissioners. In my opinion, each inspector was, if not the express agent, the implied agent of each man in his division to receive for him his salary cheque and to bring it to the station to him. In the present case, so far as the city was concerned, it did not know Stephen in the matter at all. The city, when its servant handed Guthrie's cheque to McClelland, an officer of the police department, parted with its control over it. If this view is correct, then, at the time the city was served with the attaching order herein, the

cheque in question had reached the hand of the defendant's representative or agent, Inspector Stephen, and that, so far as the city of Toronto is concerned, constituted payment of the debt due the defendant. It is claimed that the city should have stopped payment of the cheque upon being served with the attaching order. That was a step, however, which they had the right to decline to do, and there was no duty cast upon them to aid the plaintiff, and payment of the cheque not having been stopped distinguished this case from *Cohen* v. *Hale*, 3 Q. B. D. 371, cited by the plaintiff's counsel.

Whatever one may think of Guthrie's neglect to settle the outstanding judgment recovered against him by the plaintiff, the questioned to be determined by me is a question of law, and I must make my ruling thereon having regard to the facts and the law.

In my judgment, the plaintiff is not entitled to an order against the garnishees, and his application therefore fails. The city of Toronto being the only garnishees, I make no order as to costs.

MANITOBA.

In the Queen's Bench.

[BAIN, J., 8TH JUNE, 1900.

In re CANADIAN PACIFIC R. W. CO. AND BATTER.

Railways—Appointment of arbitrator—Sale by owner after service of notice by company—Position of purchaser—"Opposite party."

Application by the company under s. 150 of the Railway Act of Canada, 1888, for the appointment of an arbitrator to determine the compensation to be paid for land which the Minister of Raliways had certified it was necessary the company should acquire.

At the time the certificate was granted, the land belonged to Mrs. Batter, subject to a mortgage to Mrs. Knox; the company, having complied with the directions of s. 144 of

the Act, served on these parties the notice and certificate of a sworn surveyor, as prescribed by ss. 146, 147; Mrs. Batter gave notice of the name of a person whom she appointed her arbitrator, but no notice was given by Mrs. Knox.

After Mrs. Batter had notified the company of the appointment of her arbitrator, she sold the land to Mrs. Handel; the land had been brought under the new system, and on the certificate of title that Mrs. Handel received there was indorsed a memorandum of the deposit in the Land Titles Office of the minister's certificate and the plan and book of reference. The company served Mrs. Handel, after she purchased, with notice of the application.

An objection was taken that, as Mrs. Handel purchased, as she alleged, without notice of the proceedings that were being taken to acquire the land, she was not affected by them.

Held, that s. 145 must be understood to mean that the deposit of the plan, etc., was to be notice to all parties who might deal with the land described after the date of the deposit. As Mrs. Handel had purchased from Mrs. Batter after the proceedings to acquire the land had been commenced, she was in a position analogous to that of a purchaser during the pendency of a suit, and public policy would make it necessary to apply the maxim *pendente lite nihil innovetur,* otherwise successive alienations might defeat the purposes of the Act.

An objection was taken that, as Mrs. Batter did give notice of the appointment of her arbitrator, it could not be said that "the opposite party" had not given notice so as to bring the case within s. 150.

Held, that Mrs. Knox, being a registered mortgagee of the land, was interested in it and was a party opposed in interest to the railway company; she had not given notice of appointing an arbitrator; and, to insure the attainment of the object of the Act, it would be necessary to read the words "opposite party" in s. 150 distributively, as MEREDITH, C.J., did in *Re Toronto, Hamilton, and Buffalo R. W. Co. and Burke,* 27 O. R. 690, 16 Occ. N. 291, and to hold that, as both parties interested as against the railway company

had not given notice, the railway company had the right to apply for the appointment of a sole arbitrator.

The Master of the Court was appointed sole arbitrator.

Aikins, Q.C., and *Minty*, for the company.

Howell, Q.C., for the claimants.

BRITISH COLUMBIA.

In the Supreme Court.

[DRAKE, J., 11TH JUNE, 1900.

REGINA v. NICHOL.

Venue—Change of—Grounds for—Criminal libel—Political bias.

Motion for change of venue from the county of Victoria. The defendant was charged with criminal libel in respect of an article in the *Province* newspaper, published in Victoria on the 11th December, 1897, and reflecting on the conduct of Messrs. Turney and Pooley, then members of the Provincial Executive. The motion was made under s. 651 of the Criminal Code, 1892. The cause had been tried at Victoria in February, 1899, and in April, 1900, and at each of the trials the jury failed to agree. The affidavit of the solicitor for the defendant, used in support of the motion, set out that the prosecutors were, at the time of the alleged libel, and still are, interested in politics, and that in his belief it would be impossible to obtain a fair and impartial trial in the city or county of Victoria.

Held, that in criminal libel, in order to obtain a change of venue, it is not sufficient to allege that the prosecutor is interested in politics in the place where the libel is alleged to have been committed, and that therefore the defendant cannot obtain a fair trial. The fact that two abortive trials have taken place is not *per se* a reason for change of venue.

Langley, for the motion.

Cassidy, contra.

[MARTIN, J., 29TH MARCH, 1899.

In re "AMERICAN BOY" MINERAL CLAIM.

Mining law—Adverse claim—Certificate of improvements—Crown grant—Rectification of.

The "American Boy" mineral claim was recorded on the 22nd June, 1892, and a certificate of improvements was issued on the 6th May, 1897. On the 13th July, 1897, a Crown grant was issued, in which there was an error in the description. The field notes of the survey were received at the department of lands and works on the 24th January, 1896.

The "Ajax" and "Treasure Vault" mineral claims were recorded in October, 1892, and on the 13th October, 1897, certificates of improvements were issued in respect of these two claims.

Adverse claims by the owners of the "American Boy" against the "Ajax" and "Treasure Vault," and *vice versa*, were filed, but the proceedings of all the parties died.

In 1898 the owners of the "American Boy" applied to the Chief Commissioner of Lands and Works for a rectification of the Crown grant. This application was opposed by persons who had obtained a certificate of improvements covering a portion of the ground included in the grant—the owners of the "Ajax" and "Treasure Vault."

Held, affirming the decision of the Chief Commissioner, that the applicant was entitled to have the grant rectified, notwithstanding the certificate.

Held, also, by the Chief Commissioner, that the holder of a certificate of improvements is not bound to adverse any subsequent applicant for a certificate.

Bodwell, Q.C., and *A. E. McPhillips*, for the petitioner.

Davis, Q.C., for the respondents, the owners of the "American Boy" claim.

Supreme Court of Canada.

ONTARIO.] [12TH JUNE, 1900.

CASTON v. CITY OF TORONTO.

Assessment and taxes— Ontario Assessment Act, R. S. O. 1887 c. 193, s. 135—Imperative or directory —Failure to distrain—Enforcing payment in subsequent year.

The provisions of s. 135 of the Ontario Assessment Act, R. S. O. 1887 c. 193, in respect to taxes on the roll being uncollectable, and what the account of the collector in regard to the same shall show on delivery of the roll to the treasurer, and requiring the collector to furnish the clerk of the municipality with a copy of the account, are imperative.

Taxes on the roll not collected cannot be recovered by distress in a subsequent year, unless such arrears have accrued while the land in respect of which they were imposed was unoccupied.

Judgment of the Court of Appeal, 26 A. R. 459, 19 Occ. N. 263, affirming the judgment of a Divisional Court, 30 O. R. 16, 18 Occ. N. 402, affirmed.

Fullerton, Q.C., and *W. C. Chisholm*, for the appellants.

J. W. McCullough, for the respondent.

DUEBER WATCH CASE MFG. CO. v. TAGGART.

Bankruptcy and insolvency—Assignments and preferences—Sale of assets—Extinguishment of debt—Composition—Release of debtor.

T. and C., doing business under the name of T. & Co., made an assignment for the benefit of creditors, and T. then induced the plaintiffs, creditors, to pay off a chattel mortgage on the stock and a composition of 25 cents on the dollar of unsecured claims, the plaintiffs to receive their own debt in full with interest. The assignee of T. & Co. then transferred all the assets to the plaintiffs, and the arrangement was

carried out, the plaintiffs eventually re-conveying the assets to T., taking his promissory notes and a chattel mortgage as security. In an action against T. & Co. on the original debt:—

Held, affirming the judgment of the Court of Appeal, 26 A. R. 295, 19 Occ. N. 211, that the original debt was extinguished, and C. was released from all liability thereunder.

C. Millar, for the appellants.

W. Nesbitt, Q.C., for the respondents.

QUEBEC.]

TALBOT v. GUILMARTIN.

Apneal—Jurisdiction—Action for séparation de corps—Money demand.

In an action by a wife for *séparation de corps* for ill treatment, the declaration concluded by demanding that the husband be condemned to deliver up to the wife her property, valued at $18,000. The judgment in the action decreed separation and ordered an account as to the property.

Held, that no appeal would lie to the Supreme Court from the decree for separation.

O'Dell v. *Gregory,* 24 S. C. R. 661, followed.

And the money demand in the declaration, being only incidental to the main cause of action, could not give the Court jurisdiction to entertain the appeal.

The appeal was quashed with costs.

Stuart, Q.C., for the respondent.

Fitzpatrick, Q.C., S.-G., for the appellant.

ASSOCIATION PHARMACEUTIQUE v. LIVERNOIS.

Appeal—Jurisdiction—Action for penalties—Plea of unconstitutionality of Act—Judgment on other grounds.

The Association Pharmaceutique sued L. for $325. penalties for selling drugs without license. L. pleaded a general denial and that the Pharmacy Act was *ultra vires.*

The action was dismissed by the Superior Court for want of proof of the illegal selling alleged, and this was affirmed by the Court of Queen's Bench. On motion to quash an appeal to the Supreme Court:—

Held, STRONG, C.J., and GWYNNE, J., dissenting, that if the Court should find error in the judgment appealed from, the question of *ultra vires* pleaded by L. would have to be dealt with, and the case was therefore appealable under s. 29 (*a*) of the Supreme Court Act, though no appeal would lie if this plea were not on the record.

A motion to quash the appeal was refused with costs.

Fitzpatrick, Q.C., S.-G., for the motion.

Lajoie, contra.

McFARRAN v. MONTREAL AND PARK ISLAND R. W. CO.

Married woman—Community—Personal injuries—Right of action—Pleading—Exception à la forme.

The right of action for damages for personal injuries sustained by a married woman, *commune en biens,* belongs exclusively to her husband, and she cannot sue for the recovery of such damages in her own name, even with the authorization of her husband to bring the action.

Where it appears upon the face of the writ of summons and statement of claim that the plaintiff has no right of action, it is not necessary that objection should be taken by pleading *exception à la forme.* Absolute want of a legal right of action may be invoked by a defendant at any stage of a suit.

Macmaster, Q.C., and *F. S. Maclennan,* Q.C., for the appellant.

Stuart, Q.C., and *Francis McLennan,* for the respondent.

NOVA SCOTIA.]

STARR, SON, & CO. v. ROYAL ELECTRIC CO.

Principal and agent—Sale by agent—Commission—Evidence.

The appellants dealt in electrical supplies at Halifax, and had at times sold goods on commission for the respondents, a

company manufacturing electrical machinery in Montreal. In 1897 the appellants telegraphed the respondents as follows: "Windsor electric station completely burned. Fully insured. Send us quotations for new plant. Will look after your interest." The reply to this was: "Can furnish Windsor 180 Killowatt Stanley two phase complete exciter and switchboard, $4,900, including commission for you. Transformers, large sizes, 75 cents per light. .. . ." The manager of the appellants went to Windsor, but could not effect a sale of this machinery. Shortly afterwards a travelling agent of the respondents came to Halifax and saw the manager, and they worked together for a time trying to make a sale, but the agent finally sold a smaller plant to the Windsor company for $1,800. The appellants claimed a commission on this sale, and on its being refused brought an action therefor.

Held, affirming the judgment of the Supreme Court of Nova Scotia, GWYNNE, J., dissenting, that the appellants were not employed to effect the sale actually made; that the respondents offered the commission only on the sale of the specific plant mentioned in the answer to the request for quotations; and that there was no evidence of any course of dealing between the two companies which would entitle the appellants to such commission.

Cahan, for the appellants.

Belcourt, Q.C., for the respondents.

COLE v. SUMNER.

Contract—Offer and acceptance—Telegrams—Completion—Mutuality.

S., a grain merchant in Truro, N.S., telegraphed to C., a grain merchant in Toronto: "Quote bottom prices 20 to 25 cars, thousand bushels each, white oats delivered, basis Truro freight, bagged in our bags even four bushels each." C. replied next day: "White oats 32 half, Truro, bags two cents bushel extra." S. telegraphed on the same day: "How much less can you do mixed oats for? Might work white at 32, but not any more. Answer." C. answered: "Mixed oats scarce but odd cars obtainable half cent less. Exporters bidding for white. Highest freight, Truro freight two half

over Halifax. Offer white 32 hulled, 34 half in 4 bushel bags, Truro." Next day S. wired: "I confirm purchase 20,000 bushels oats, white, at thirty-two, mixed at thirty-one half bagged even four bushels in my bags. Confirm. May get order five cars more in bulk." And he confirmed it also by letter. C. answered telegram at once: "Cannot confirm bagged. Am asked half cent for bagging. Bags extra." S. replied: "All right. Book order. Will have to pay for bagging." C. wired on the same day: "Too late to-day. Made too many sales already. Will try confirm to-morrow." On receipt of this S. wrote urging action, and next day wired: "Will you confirm oats? Completed sale receipt first telegram yesterday. Expect you to ship." C. answered next day: "Market advanced two cents here since yesterday noon. Had oats under offer expecting your order until noon yesterday. When you accepted bagged, parties demanded half cent for bagging. They sold before your second wire arrived yesterday. This is why I could not confirm. Think advance too sudden to last." He wrote to S. to the same effect that day. The oats were never delivered, and S. brought an action for damages.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that there was no completed contract between the parties, as they did not come to an understanding in respect to some of the material terms, and S. could not recover.

W. J. O'Connor, for the appellant.

Borden, Q.C., for the respondent.

BRITISH COLUMBIA.]

HIBBEN v. COLLISTER.

Partnership—Construction of deed—Continuance after expiry of term—Deceased partner—Purchase of share—Discount—Goodwill.

A deed, providing for a partnership during seven years from its date, provided for purchase by the survivors of the share of a deceased partner, with a special provision that if one partner, K., should die, the value of his share should be

subject to a discount of twenty per cent. After the seven years had expired, the partners continued the business by verbal agreement for an indefinite period, and, while it so continued, K. died.

Held, varying the judgment of the Supreme Court of British Columbia, that, even if the parties had not admitted that the business was continued under the terms of the partnership deed, such terms would still govern, as there was nothing in the deed repugnant to a partnership at will; that the surviving partners had, therefore, a right to purchase the share of K., and to be allowed the deduction of twenty per cent. therefrom, as the deed provided; and that, in the absence of any stipulation in the deed to the contrary, the goodwill of the business and K.'s interest therein should be taken into account in the valuation to be made for such purpose.

Aylesworth, Q.C., for the appellant.

Riddell, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[OSLER, J. A., FERGUSON, J. 26TH JUNE, 1900.

In re BAKER.

Parliamentary elections—Penalty for corrupt practices—Remission in part—Special circumstances—Amendment of law since offence—Disfranchisement.

Application by Thomas Edward Baker, under R. S. O. c. 108, s. 1, for remission, in whole or in part, of the penalties imposed on him in January, 1900, upon his conviction

for corrupt practices committed by him at a Provincial election for the south riding of Ontario. Four offences were found against him out of a number for which he had been reported, and he was fined for each offence $200, the penalty attached thereto by the Election Act, or $800 in all.

The applicant's affidavit set forth that he had lodged the whole amount of $800, together with the taxed costs of the proceedings against him, in the hands of the Crown Attorney for his county; that he was a married man, with a wife and family dependent on him for support; that he had with great difficulty raised the money, and had borrowed the greater part of it from his employers, who advanced it on his agreement to repay $3 per week out of his wages until the whole amount should be repaid; that he was in receipt of a salary of $5 a week, and was to receive an increase from the 1st August next, when the repayments were to begin; that these would be a heavy burden to him, and in order to make them he would be compelled to deprive himself and his family of many of the ordinary necessaries of life.

The applicant in person.

Farewell, Q.C., for the Crown, stated that he had been instructed not to oppose the making of such order as the Court might think proper.

OSLER, J.A.—The question is one of considerable importance. On the one hand, care is to be taken that the impression shall not go abroad that fines for these serious offences may be remitted as a matter of course, or that they ought not to be visited with substantial punishment; while, on the other hand, it is to be remembered that, in vindicating the law, oppressive fines, or fines which, in the circumstances, may be oppressive, should not be exacted. By one Act the Legislature has fixed the amount of the fine; by another it has placed it in the power and discretion of the Judges to relieve the offenders. We have thought it right to discuss the questions with several of our brother Judges who have had, like ourselves, to deal with procecutions of this kind, and they concur in the principle on which we propose to deal with the present application.

In this particular case there are some circumstances which, we think, invite favourable consideration. The applicant was a witness at the trial of the petition, and he claimed under the Act, and became entitled to, protection, so far as it could then be given to a witness who made full and truthful answers to the satisfaction of the Judges. This protection extended only to prevent the evidence of the witness from being made use of in any subsequent proceeding which might be taken against him by way of prosecution for offences under the Act, though we have little doubt that the witness thought it went much further, and would be an entire bar to any such prosecution. By s. 27 of the Act of last session (63 V. c. 4) amending the Ontario Election Act, a witness who obtains such a certificate as the applicant was entitled to is in the future protected against all prosecutions for pecuniary penalties, and the Legislature has thus, though not making the law retrospective, declared its opinion of what is reasonable in such circumstances, and had the present law been in force when the petition was tried, though the applicant would have incurred the penalty of disfranchisement, he would not have been liable to the pecuniary penalties. While, therefore, the new Act does not relieve a witness in the situation of the applicant, whose evidence was not given before it was passed, we think it suggests a reason, perhaps not a very logical one, but still one which invites the exercise of discretion in mitigating the penalties which have been imposed under the law as it formerly stood. The total amount is, for a person of the position in life and the means of the applicant, undoubtedly large, and were he compelled to pay it in full, it would simply mean that his head is, so to speak, to be kept under water and his efforts to procure a livelihood embarrassed, perhaps for years.

On the whole we are of opinion that, while the pecuniary penalty must remain for a substantial amount, taking all the circumstances into consideration, the applicant will be sufficiently punished by disfranchisement and payment of the sum of $300, to which amount we reduce the whole sum payable under our former order. We do not interfere with the order as regards the costs of the proceedings.

FERGUSON, J.—I fully agree.

HIGH COURT OF JUSTICE.

[ARMOUR, C.J., STREET, J., 3RD JULY, 1900.

In re TOWNSHIP OF METCALFE AND TOWNSHIPS OF ADELAIDE AND WARWICK.

In re TOWNSHIP OF COLCHESTER NORTH AND TOWNSHIP OF GOSFIELD NORTH.

Costs—Scale of—Appeal from judgment of Drainage Referee.

Having regard to ss. 111, 112, and 113 of the Municipal Drainage Act, R. S. O. c. 226, and no tariffs of fees having been framed thereunder, the tariff of the County Courts applies not only to proceedings before the Drainage Referee, but to appeals from his decisions; and therefore the basis of taxation of the costs of an appeal to the Court of Appeal from the decision of the Referee should be the County Courts tariff.

Riddell, Q.C., for the corporation of Gosfield North.

Folinsbee, for the corporation of Metcalfe.

Langton, Q.C., for the corporation of Colchester North.

C. A. Moss, for the corporations of Adelaide and Warwick.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 3RD JULY, 1900.

BABCOCK v. STANDISH.

Costs—Scale of—County Court—Payment into Court—Sum within competence of Division Court—Acceptance by plaintiff.—Order for set-off—Finality—Appeal.

The plaintiff in an action in a County Court claimed $140, the balance alleged to be due upon the sale of a chattel, and the defendant brought into Court $95 in full of the plaintiff's cause of action, which the plaintiff accepted in due time. The Judge of the County Court thereupon made a summary

order allowing the defendant to set off his costs incurred in the County Court in excess of such costs as he would have incurred in a Division Court against the costs of the plaintiff, and to enter judgment and issue execution for the excess, if any, of the costs of the defendant over and above the costs of the plaintiff.

Held, that the plaintiff was entitled to tax his costs of the action according to the County Court scale, irrespective of the amount paid into Court and accepted by him in satisfaction of his claim; and the plaintiff being entitled to his costs by the express provision of Rule 425 (which is not qualified by Rule 1130), they were not subject to the discretion of the Judge.

Held, also, that the order of the Judge was in its nature final, and therefore appealable under s. 52 of the County Courts Act, R. S. O. c. 55.

W. H. Blake, for the plaintiff.

W. E. Middleton, for the defendant.

[9TH JULY, 1900

TUFTS v. PONESS.

Sale of goods—Non-acceptance—Contract—Tender— Waiver— Damages—Price of goods—Property not passing—Possession—Judgment— Payment into Court.

On the 30th May, 1899, the plaintiff and defendant agreed in writing for the sale by the former to the latter of certain goods for $175, payable $30 on receipt of bill of lading for or tender of the goods, and the balance to be paid in instalments, for which promissory notes were to be given; the property to remain in the plaintiff until payment of the notes, but the goods to be shipped as soon as possible. On the 6th June the plaintiff sent the defendant an invoice of the goods. On the 14th June the defendant wrote to the plaintiff refusing to proceed with the contract upon the ground that the invoice price was not that agreed upon. On the 15th June the plaintiff advised the defendant that

the goods had been shipped and draft and notes forwarded. Some correspondence ensued, but the defendant adhered to his refusal to take the goods. The goods arrived at the town where the defendant lived on the 10th July, and the defendant on the 20th July again wrote to the plaintiff that he had supposed that the plaintiff had concluded not to ship the goods, and again refused to take them, giving as a ground that the season for use of them had passed, and saying that they were now at the station at the plaintiff's risk.

Held, that the defendant having refused to perform his contract on the 15th June, at which date he did not contend that there had been default on the plaintiff's part, and his refusal remaining unretracted down to the time of the arrival of the goods in July, his right to require tender at the date fixed for the performance was waived: *Ripley* v. *McClure*, 4 Ex. 345; Benjamin on Sales, 7th Am. ed., p. 789.

Held, also, that the plaintiff was entitled to recover the full price of the goods as damages for breach of the contract, upon the ground that the right to the possession of the goods having been transferred by the plaintiff to the defendant, the plaintiff had done all that he was required by the contract to do to entitle himself to payment of the price. The stipulation by which the property in the goods was to remain in the plaintiff during the term of credit, notwithstanding the delivery of possession to the defendant, and the fact that the plaintiff had given up possession to the defendant, as far as he could, took the case out of the general rule which prevents a vendor from recovering the price where he has not parted with the property in the goods.

Held, further, that the defendant should be allowed to pay the amount of the judgment and costs against him into Court, to be paid out to the plaintiff upon his shewing that the defendant could still obtain possession of the goods.

F. E. Hodgins, for the defendant.

F. A. Anglin, for the plaintiff.

[ROSE, J., 12TH JUNE, 1900.

ROSS v. THE QUEEN.

Succession Duty Act—Deduction of debts—Compromise of claim by executors —R. S. O. c. 24, s. 3, s.-s. 3.

Held, that, for the purpose of arriving at the aggregate value of the property of a deceased person under s. 3, s.-s. 3, of the Succession Duty Act, R. S. O. c. 24, debts are to be deducted. The duty to be paid by the person who takes is on the value of the estate which he takes at the time of taking; and the estate on which the duty is to be paid is the surplus estate after payment of debts.

Held, also, that a certain sum *bona fide* paid by executors for the purpose of settling a claim against them as such, must be considered a debt for the purpose of administration and of ascertaining the amount of succession duty.

J. H. Macdonald, Q.C., and *Ebbels*, for the plaintiffs.

J. R. Cartwright, Q.C., for the Crown.

[15TH JUNE, 1900.

SALE v. LAKE ERIE AND DETROIT RIVER R. W. CO.

Appeal—Report of referee—Reference of matters in dispute in an action— "In a summary way."

Proceedings in an action upon a solicitor's bill were stayed upon a certain agreement being entered into between the parties, whereby it was provided that evidence as to services rendered and disbursements made was to be given to a certain accountant named, and "in case of dispute as to services rendered or disbursements made, the matters disputed are to be referred in a summary way to F. E. Marcon, deputy clerk at Windsor, under R. S. O. c. 174, for decision."

Held, that by "a summary way," the parties meant that the reference was to be without ceremony or delay, the words

"under R. S. O. c. 174" merely introducing the procedure under that Act (the Act respecting solicitors), but not to be construed as providing for an appeal from the report made by the deputy clerk upon such reference.

F. A. Anglin, for the plaintiff.

W. H. Blake, for the defendants.

[4TH JULY, 1900.

KIRBY v. RATHBUN CO.

Company—Winding-up—Mortgage to creditor—Setting aside—Insolvency—Knowledge—"May be set aside"—Presumption—Rebuttal—R. S. C., c. 129, ss. 68-71.

A mortgage of land made by an incorporated company in favour of a creditor within thirty days prior to the beginning of winding-up proceedings was attacked by the liquidator as being void under some of the provisions of ss. 68 to 71, inclusive, of the Winding-up Act, R. S. C. c. 129.

Held, notwithstanding the fact that the mortgage was given upon demand of the mortgagee, that the transaction must be avoided under s. 69, the mortgage being a conveyance for consideration, respecting real property, by which creditors were injured or obstructed, made by a company unable to meet its engagements; and it was not material under this section whether the mortgagee was or was not ignorant of such inability; but the transaction, being within the thirty days, was voidable, and should therefore be set aside, that being the effect of the words "may be set aside."

Held, also, that the words of s. 69, "upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court orders," were not applicable to the giving of a mortgage as security for a past debt.

Held, also, that none of the other sections relied on applied so as to avoid the mortgage; and, following *Lawson* v. *McGeach*, 22 O. R. 474, 20 A. R. 464, and distinguishing

Webster v. *Crickmore*, 25 A. R. 97, that the presumption referred to in s. 71 is rebuttable.

Orde, for the plaintiffs.

Hogg, Q.C., for the defendants.

[STREET, J., 3RD JULY, 1900.

ARMSTRONG v. JOHNSTON.

Bankruptcy and insolvency—Preference—Promise to give security—Presumption—Rebuttal—Payment—Transfer of security—Cheque—Promissory notes—Discount by third person.

In April, 1898, a firm of traders, desiring to purchase goods, obtained from a bank accommodation to the extent of about $8,200 for the purpose of buying them, upon promissory notes indorsed for their accommodation by the defendant, a brother of one of the partners, they promising him to retire the notes out of the proceeds of the sales of the goods. The proceeds were not so applied, to the defendant's knowledge, and the notes were from time to time renewed in full, the defendant indorsing them upon each renewal. He was satisfied by a general promise that they would secure him, but no security was ever definitely mentioned, nor did he ever press for it. On the 27th May, 1899, the firm sold out their assets for nearly $11,000, their liabilities being about $19,000. Before the sale was carried out the defendant became aware that the firm was insolvent. The purchase money was paid to the firm, $1,000 in cash, $5,000 by a cheque to their order, and the remainder by promissory notes. The firm handed over the cash to the defendant, and indorsed the cheque and some of the notes to him, and he with the cash and the proceeds of the cheque and notes, the latter being at his request indorsed and discounted by a stranger for him, retired all the notes upon which he was liable, and paid, besides, some rent, taxes, and other debts due by the firm. On the 2nd June, 1899, the firm assigned to the plaintiff for the benefit of their creditors; and this action was afterwards brought to recover from the defendant the amount applied in retiring the notes, upon the ground that he had been unjustly preferred.

Held, that the promise to give the defendant security could only mean that the firm, being unable to pay or secure the notes for fear of bringing on immediate insolvency, would pay or secure them in the future in case their affairs should become desperate, and such a promise was not sufficient to rebut the statutory presumption of a preference: *Webster* v. *Crickmore*, 25 A. R. 97; *Ex p. Fisher*, L. R. 7 Ch. 636; Cassels's Assignments Act, 3rd ed., p. 14.

The payment of $1,000 in cash to the defendant could not be attacked, and that should be treated as having formed part of the sum of $5,200 paid to retire two of the notes.

The $5,000 cheque transferred to the defendant was not a payment in cash, but was the transfer of a security, and he was liable to repay the proceeds of it, less the portion expended in paying debts, etc., of the firm: *Davidson* v. *Fraser*, 23 A. R. 439.

The notes indorsed by the firm, and handed to the defendant for the purpose of procuring the payment of the remaining note which he had indorsed for them, were handed by him to the stranger in pursuance of that purpose, and what the latter did was done for the defendant, and not for the firm, and must be treated as if done by the defendant himself: *Botham* v. *Armstrong*, 24 Gr. 216; *Churcher* v. *Cousins*, 28 U. C. R. 540.

Gibbons, Q.C., for the plaintiff.

Magee, Q.C., for the defendant.

IN CHAMBERS.

[MEREDITH, C.J., 13th JULY, 1900.

GEARING v. ROBINSON.

Costs—Mechanic's lien—Appeal—R. S. O. c. 153, ss. 41, 42, 45.

Sections 41 and 42 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. c. 153, limiting "the costs of the action under the Act" to twenty-five per cent. of the judgment, besides actual disbursements, do not apply to the costs of an appeal from the decision of the Judge or officer trying the action.

Semble, that the costs of such an appeal are within the scope of s. 45.

Du Vernet, for the plaintiff.

W. N. Ferguson, for the defendants A. McGee and other

In the First Division Court in the County of York.

[MORSON, JUN. Co. J., 4TH JULY, 1900.

GILLIES v. HODGSON.

Municipal corporations—Negligence—Public market—Injury to cattle—Duty of corporation.

An action by Patrick Gillies against W. W. Hodgson and the corporation of the city of Toronto to recover damages for the loss of fourteen steers which were maimed and mutilated by the cutting off of their tails while in the Western Cattle Market of the city of Toronto. The defendant corporation were the owners of the market, which was for the buying and selling of cattle, and the defendant Hodgson was the lessee of the market fees.

The plaintiff, on the 25th March, 1899, had placed his steers in a pen in the market for safe keeping, after he had purchased them, and until he was ready to take them away, and had paid the usual market fee, and while the steers were there, and unattended by the plaintiff or any one on his behalf, their tails were cut off above the dock, and part of the bone was cut off, in consequence of which some of them bled to death, and others were greatly depreciated in value for selling purposes.

Lindsey, Q.C., for the plaintiff, contended that at common law and under the by-laws of the defendant corporation, to which the plaintiff had to submit, the defendant corporation were liable for any injury done to his cattle through the negligence of the caretaker or other employee of the corporation at the cattle market, and that the injuries complained of were the result of the negligence of the caretaker or other employees. The plaintiff abandoned as to the defendant Hodgson.

W. C. Chisholm, for the defendants, *contra*.

MORSON, JUN. CO. J.—Under the Municipal Act the city corporation have the power to establish markets and to collect fees; and having, under this Act, established the Western Cattle Market, and fixed the fees to be paid by all persons using it, certain duties are imposed towards the public frequenting the market, such as providing proper and safe accommodation for the cattle and facilities for the buying and selling of the cattle, and for the regulation of the market generally in the public interest, and this the city corporation have done by the various by-laws and otherwise. I do not think, however, that there is any duty imposed to take charge of the cattle, in the sense that they must be watched and that care must be taken to see that no one injures them, and I do not think the by-laws in force are intended to go that far. The cattle still remain in charge of the persons putting them in the market and using the facilities it affords, and it is their duty, not the city's, to see that no injury is done them. If the injury arose through improperly constructed pens, or if the cattle fell into ditches or over obstructions in the market and were injured, or were injured in attempting to jump a spiked railing, as was the cast in *Lax* v. *Corporation of Darlington*, L. R. 5 Ex. 28, the city corporation would be liable, because it is their duty to keep the market in a safe condition for the cattle of the persons who come to market with them and pay the fees. By s.-s. 4 of s. 30 of by-law No. 2469, it is true, the caretaker is required to take reasonable care of the cattle placed in the market, but this, in my opinion, is not an assuming by the city of the charge or care of the cattle so as to relieve the owner or person in charge of them, and make the city liable for injury through negligence; it is only another advantage or privilege the market affords the persons using it—they get the benefit of the caretaker in looking after them, but it could not be intended by this that the owners or persons in charge were to be freed from the responsibility of looking after their own cattle to see that no harm comes to them. The city corporation do not assume control or take charge of the business done in the markets, but only regulate it and afford proper facilities for its being done. They do not take charge of the cattle or goods so as to become

responsible for their safety; that is a matter for the owners or persons in charge. All the city corporation do is to set apart certain public places as markets, where business may be done on payment of the regular market fees, and their legal duty is fulfilled when they furnish proper and safe facilities for these market purposes.

Even if the city were liable for the safe keeping of the cattle, on the evidence in this case I could not come to the conclusion that they were negligent or had not taken reasonable care. The only evidence on this point is that the police constable in charge went to dinner, as was his usual habit, between the hours of noon and one o'clock, when the injury was done to the cattle; but this in itself is not negligence. The pens were safe to prevent the cattle escaping, and the city could not, in my view of the law, be bound to anticipate and provide against an injury of the kind complained of. It was not shewn that, if the policeman had been there, the cattle would not have been injured, and I am satisfied that, even if he had, the miscreants who did it would still have done it.

For the reasons, then, that I have stated, I think the plaintiff must fail, and I therefore give judgment for the defendants, with costs.

In the First Division Court in the County of Hastings.

[FRALECK, JUN. Co. J., JUNE 1900.

MURPHY v. SWEENEY.

Promissory note—Lost instrument—Action on—Increased jurisdiction of Division Court—Ascertainment of amount by signature—Statute of Limitations—Absence of defendant beyond seas—Interest—Arrears.

The plaintiff claimed from the defendant the sum of $325.70, being the amount of a promissory note and interest thereon at six per cent. per annum.

The note was for $167, dated the 25th February, 1882, and was made by the defendant, payable nine months after

date, with interest at six per cent. until paid. The note was lost. The defendant pleaded the Statute of Limitations.

J. Williams and *E. J. Butler*, for the plaintiff.

W. N. Ponton, for the defendant.

FRALECK, JUN. CO. J.—I think it is undisputed upon the evidence that the defendant signed the note which forms the subject-matter of this suit, and that such note was also signed by the plaintiff as surety for the defendant, and at or after maturity was paid by the plaintiff.

The note being made in 1882, shortly after the making thereof the defendant moved to Dakota, one of the United States of America, and has never since returned to this Province.

Some few years ago the note was destroyed by fire, when the plaintiff's house and effects were burned.

This action was commenced in this Court on the 6th day of January, 1900.

At the first hearing there was so much uncertainty surrounding the plaintiff's claim, that I gave a non-suit without costs.

Application for a new trial was made upon the ground of new evidence discovered and upon other grounds, and a new trial was granted.

The defendant offers no evidence; but his admissions to the witnesses McNail and Deasey prove the making of the note beyond question, and his liability thereon, independent of the plaintiff's or McGurn's evidence.

It is contended that the condition precedent to give jurisdiction to this Court to entertain a suit for the amount sued upon herein is the signature of the defendant, that it is not a question of ascertaining by evidence, it is one of ascertaining by the signature. If this be so, the signature and not the evidence must be produced to recover on a lost bond, deed, or note, or any other document, and, if the signature could not be produced, no recovery could be had upon any lost document, and all statutes in that behalf are of no use or effect whatever But what is the production of the signature but ascertaining by evidence and evidence of the highest degree? If it is proved that the document existed

and that the signature was attached, and if that proof is followed by proof of the loss, then secondary evidence of its contents is admissible.

It is also contended that the plaintiff's right to recover is barred by the Statute of Limitations, or at all events that the plaintiff cannot sue except within six years after the defendant returns to this country. After giving this matter my best attention, I can find no statute or case preventing the bringing of the action while the defendant is living abroad.

It is certainly an exceptional case, and the plaintiff has slept upon his rights for nearly eighteen years, but I can find no authority by which I can deprive him of his interest during all these years, or debar him from obtaining judgment.

I must find for the plaintiff, and accordingly judgment will be entered for him for $325.70 and costs to be paid forthwith.

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[MEAGHER, J., 22nd June, 1900.

WENTWORTH v. WALSH.

Mortgage—Foreclosure—Second order—Subsequent incumbrancer.

Where a first mortgagee has commenced a foreclosure suit, and has obtained an order for foreclosure and sale, a second order for foreclosure and sale will not be granted to a second mortgagee in a second action in respect of the same lands. Such an order is unnecessary and oppressive. The second mortgagee's course is to protect his rights at the sale held under the first order.

Gourley, Q.C., for the plaintiff.

[30TH JUNE, 1900.

GRANT v. WALSH.

Costs—Mortgage—Surplus after sale under first mortgage—Costs of suit to enforce second mortgage—Unnecessary proceeding—Distribution of surplus—Priorities—Dower.

After a sale of land under a decree for sale or foreclosure in a mortgage action, there was a surplus of $1,095, subject to a small amount due for taxes and a second mortgage for $500, on which there was due on the 2nd June, 1900, $521.34.

The widow of the mortgagor and the administrators of his estate applied, on notice to the second mortgagee, for an order for payment to the applicants of the surplus proceeds, less the amount payable to the second mortgagee.

The second mortgagee also applied for an order for payment to him of what was due on his mortgage for principal, interest, and costs, including the costs of a foreclosure suit instituted by him: *Wentworth* v. *Walsh, supra.*

Lawrence, Q.C., for the widow and administrators.

Gourley, Q.C., for the second mortgagee.

MEAGHER, J.—The second mortgagee, Wentworth, could have awaited the sale under the decree in this suit, without the least prejudice to himself, and therefore the bringing of his suit was a wholly unnecessary proceeding, and, in a sense, an oppressive one in the matter of costs. I therefore decline to make any order awarding Wentworth costs of his suit for foreclosure out of the fund in Court.

The fund should be disposed of as follows: (1) Taxes chargeable against the mortgaged lands to be paid. (2) One-third of the fund to be paid to the Accountant-General to be invested by him, and the income therefrom paid yearly to the mortgagor's widow during her natural life, as and for her dower in the land. (3) The principal and interest up to the date of this order due upon the second mortgage to be paid. (4) The balance, less any costs payable to their solicitor under this order, to be paid to the administrators upon clear proof that the fund will be required to pay the deceased

mortgagor's debts, upon security given that it will be devoted to that purpose, and any balance will be held for the children of the deceased.

The second mortgagee is entitled to costs for attendance upon the motion of the administrators and widow, or at all events for attendance upon their solicitor to peruse the material to be used in support of the motion and to settle the terms of the order securing payment to the second mortgagee, and formally assenting thereto, and the costs of either of these steps, as the solicitor for the second mortgagee may elect, will be paid out of the fund next after the payment of the mortgage, the taxes, and the sum set apart for dower.

McLAUGHLIN CARRIAGE CO. v. OLAND.

Particulars—Action on bond—Defences—Release by time given to principal—Ratification of breaches—Securities.

Motion by the plaintiffs for particulars of the defence The action was on a bond executed by the defendant as surety for another. The defendant pleaded that the plaintiffs had released him by giving time to the principal to make certain payments; that the plaintiffs had ratified and confirmed the breaches of the bond by their conduct towards the principal; and that the plaintiffs held certain securities for the payment of such sums as might be found due in the action. The particulars asked for were: (1) of the occasions when time was given, and whether by a written instrument or otherwise; (2) of the acts of ratification and confirmation and the course of conduct relied on; (3) of the securities alleged by the defendant to be held by the plaintiffs.

W. F. O'Connor, for the plaintiffs.

C. P. Fullerton, for the defendant.

MEAGHER, J.—I think the motion should prevail. The particulars in question will narrow the inquiry which otherwise might have to be made on the trial, and will enable

the plaintiffs to know in advance the nature and particulars of the case they have to meet, and to limit their preparation accordingly, and thus reduce the costs.

The costs of the application will be the plaintiffs' in any event.

BRITISH COLUMBIA.

In the Supreme Court.

[DRAKE, J., 21ST JUNE, 1900.

REGINA v. HOLLAND.

Constitutional law—Insurance Act of Canada—Insurance company—License for British Columbia.

H. was the authorized agent at Vancouver of the Equity Fire Insurance Company, a company incorporated in Ontario but which was not registered or licensed under the provisions of any British Columbia statute or of the Insurance Act of Canada. H. was convicted by the police magistrate for Vancouver, under the provisions of the Insurance Act, for carrying on an insurance business without a license.

Held, on appeal, affirming the conviction, that the Act is *intra vires* of the Parliament of Canada.

Hunter, for the appellant.

Peters, Q.C., and *A. E. McPhillips, contra.*

[MARTIN, J., 14TH MARCH, 1900.

TATE v. HENNESSEY.

Writ of summons—Service out of jurisdiction—Order allowing—Jurisdiction of local Judge—Affidavit—Setting aside order.

Motion to set aside an order made by Spinks, Lo. J. S. C., allowing the plaintiffs to issue a writ for service out of the jurisdiction. The action was for a declaration that the

defendants held certain interests in mineral claims in trust for the plaintiffs. The cause of action was fraudulent misrepresentation.

Held, that a local Judge of the Supreme Court has jurisdiction to make an order for an *ex juris* writ.

The affidavit leading to the writ should be reasonably precise as to the essential facts alleged to constitute the cause of action, and if there are omissions of substance, the order should not be made.

A Supreme Court Judge has power on motion to set aside an *ultra vires* order made by a Judge of limited jurisdiction.

Order set aside.

Duff, for the motion.

J. K. Macrae, for the plaintiffs.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [29TH JUNE, 1900.

REGINA v. DAVY.

Criminal law—Trespass—Damage to property—"Fair and reasonable supposition of right"—R. S. O. c. 120, s. 1—Criminal Code, s. 511—Water and watercourses—Access to shore—Crown grant.

The honest belief of a person charged with an offence under R. S. O. c. 120, s. 1 (unlawfully trespassing), or the Criminal Code, s. 511 (wilfully committing damage to property), that he had the right to do the act complained of, is not sufficient to protect him; there must be fair and reasonable ground in fact for that belief.

The usual reservation in a patent of land bounded by navigable water of "free access to the shore for all vessels, boats, and persons" gives a right of access only from the water to the shore, and in this case a person who had broken down fences and had driven across private property to the shore, was held not to be able to successfully assert, when charged under R. S. O. c. 120, s. 1, and the Criminal Code, s. 511, that he "acted under a fair and reasonable supposition of right" in so doing.

Judgment of a Divisional Court affirmed.

Clute, Q.C., and *G. F. Ruttan*, for the appellants.

Aylesworth, Q.C., and *J. H. Madden*, for the respondent.

KIMBALL v. COONEY.

Will—Construction—Annuity—Interest on fund—Corpus.

A testator by his will directed his executors "to take as much of my estate and moneys to be put to interest as will make $200 of interest per year, said amount of $200 to be paid to my beloved wife * * * each and every year of her life, said $200 to be paid by my executors to my beloved wife on the 1st day of January next after my decease, and every subsequent payment to be paid on the 1st day of January in each and every year thereafter. * * * At the death of my said wife said principal to be equally divided between my brothers." There were specific devises of some real estate and chattels, and the residue was not sufficient to produce $200 a year.

Held, affirming the judgment of a Divisional Court, that the widow was entitled to $200 a year, and to use the corpus for that purpose.

A. A. Hughson, for the appellants.

J. N. Fish, for the respondent.

MYERS v. BRANTFORD STREET R. W. Co.

Street railways—Operation of electric car—Duty of motorman—Negligence—Frightening horses—Nonsuit.

An appeal by the defendants from the judgment of a Divisional Court, 31 O. R. 309, *ante* 35, was allowed with costs, the Court agreeing with the reasons given by STREET, J., in his dissenting judgment in the Court below.

J. A. Paterson, for the appellants.

Brewster, Q.C., for the respondent.

EVES v. BOOTH.

Dower—Husband and wife—Separation deed—Trustees—Covenant as to release of dower—Construction of.

A covenant in a separation deed by trustees on behalf of the wife, that the wife will whenever called upon release

her dower in any lands which the husband may acquire, is a bar to a claim by her to dower in lands afterwards acquired by him.

Judgment of a Divisional Court, 30 O. R. 689, 19 Occ. N. 244, affirmed.

George Wilkie and *J. E. Irving*, for the appellant.

A. Hoskin, Q.C., for the respondent.

BOYD, C.]

HIGGINS v. TRUSTS CORPORATION OF ONTARIO.

Mortgage—Purchaser of equity of redemption—Indemnity—Death of mortgagor—Release of purchaser—Insolvent estate—Administrator.

The administrators of the insolvent estate of a deceased mortgagor are not liable in damages to his mortgagee as upon a devastavit, because they release the purchaser of the equity of redemption in the mortgaged property from his liability to indemnify the mortgagor in respect of the mortgage.

Judgment of BOYD, C., 30 O. R. 684, 19 Occ. N. 280, affirmed.

R. U. Macpherson and *G. C. Campbell*, for the appellant.

Aylesworth, Q.C., and *J. H. Moss*, for the respondents.

ARMOUR, C. J.]

WINTEMUTE v. BROTHERHOOD OF RAILROAD TRAINMEN.

Life insurance—Benevolent society—Beneficiary certificate—Forfeiture—Non-payment of dues—Rules—Conditions—60 V. c. 36, s. 144 (O.)

The defendants were an unincorporated union or society of workmen of a particular class, having their head office in a foreign country, with unincorporated branches or lodges in this Province.

Held, that beneficiary certificates issued by them to members, entitling members or their representatives, upon payment of certain assessments and compliance with certain

conditions, to certain pecuniary benefits, were not subject to the provisions of s. 144 of the Ontario Insurance Act, 60 V. c. 36.

Held, also, that, even if the Act did apply, a beneficiary certificate not containing an absolute contract to pay any sum, but stating merely that upon compliance with the conditions, and upon payment of the assessments, directed by the constitution, the sum authorized by the constitution would be paid, and that any default would render the certificate void, was not within the section, and that the conditions of the constitution must be read into it in determining its validity.

Judgment of ARMOUR, C.J., reversed.

A. H. Clarke, for the appellants.

F. D. Davis, for the respondent.

FILE V. UNGER.

Master and servant—Parent and child—Negligence.

The doctrine of the liability of a master for his servant's negligence applies in the case of the implied relationship of master and servant sometimes existing between parent and child, but as in the case of master and servant so in that of parent and child there is no liability if at the time the negligent act is committed the child is engaged in his own affairs and not on the parent's behalf.

The father of a lad of twenty, living at home, was held not liable, therefore, for an accident caused by the lad's negligence while driving, with the father's implied permission, the father's horses and carriage home from a shop to which the lad had gone to purchase, with money earned by himself, articles of clothing for himself.

Judgment of ARMOUR, C.J., reversed.

Thomson, Q.C., for the appellant.

Aylesworth, Q.C., for the respondent.

MEREDITH, C. J.]

HORSMAN v. CITY OF TORONTO.

Assessment and taxes—Distress—Change of ownership—Chattel mortgage—Purchase from mortgagee—R. S. O. c. 224, s. 135, s.-s. 4 (b).

Goods purchased from the chattel mortgagee thereof are not "claimed * * * by purchase, gift, transfer, or assignment" from the mortgagor within the meaning of R. S. O. c. 224, s. 135, s.-s. 4 (*b*), so as to make them liable in the purchaser's hands to distress for taxes due by the mortgagor.

Judgment of MEREDITH, C.J., 31 O. R. 301, *ante* 11, affirmed.

Fullerton, Q.C., for the appellants.

Brewster, Q.C., and *Heyd*, Q.C., for the respondent.

FERGUSON, J.]

CULBERTSON v. McCULLOUGH.

Estate tail—Bar of entail—Mortgage—Will—Construction.

By a will made in 1847 a testator, who died in 1854, devised to his son a piece of land, describing it, and proceeded: "All which shall be and is hereby entailed on my said son and his heirs for ever." In 1859 and again in 1860 the son granted the land in question in fee by way of mortgage, each mortgage being duly registered within a few days of its execution and each containing the usual proviso that it was to be void on payment at a named date. No discharge of either mortgage or reconveyance of the mortgaged land had been registered, and there was no evidence whether either mortgage had in fact been paid.

Held, per OSLER and MOSS, JJ. A., that under this will the son did not take an estate tail; MACLENNAN and LISTER, JJ. A., contra.

But *held*, also, *per Curiam*, that, even if the son did take an estate tail, that estate tail had been barred and converted into an estate in fee simple in his own favour as

well as in that of the mortgagee by the execution and registration of the mortgages.

Lawlor v. *Lawlor*, 10 S. C. R. 194, and *Plomley* v. *Felton*, 14 App. Cas. 61, applied.

Judgment of FERGUSON, J., affirmed.

E. G. Porter, for the appellants.

Aylesworth, Q.C., and *Northrup*, for the respondent.

STREET, J.]

REGINA v. MURDOCK.

Criminal law—Conviction—Certiorari—Amendment—Criminal Code, s. 889—Indian Act.

Under s. 889 of the Criminal Code, the Court, if a conviction under any Act to which the procedure in the Code applies is brought up by certiorari (whether in aid of a writ of *habeas corpus* or on motion to quash the conviction, is immaterial), may hear and determine the charge as disclosed by the depositions upon the merits, and may confirm, reverse, vary, or modify the decision.

A conviction under the Indian Act, defective on its face, was amended by describing the offence accurately, and by substituting for imprisonment for six months and a fine of $50 and $5 costs or imprisonment for a further term of six months in default of payment of the costs or in default of sufficient distress, imprisonment for six months and a fine of $50 and $5 costs or imprisonment for a further term of three months in default of payment of the fine and costs.

Judgment of STREET, J., affirmed.

DuVernet, for the prisoner.

The Crown was not represented.

CLARK v. BELLAMY.

Executors and administrators—Negligence—Agent's fraud—Limitation of actions—Trustee Limitation Act, R. S. O. c. 129, s. 32.

The Trustee Limitation Act, R. S. O. c. 129, s. 32, protects executors where, relying in good faith on the state-

ment of their testator's solicitor that he has in his hands securities sufficient to answer a fund they are directed by the will to invest for an annuitant, they distribute the estate, and it is afterwards found that before the testator's death the solicitor had misappropriated the money given to him by the testator to invest, and had in fact at the time of the representation no securities or money in his hands.

Payments made from time to time by the solicitor to the annuitant, ostensibly as of interest received by him from the fund, do not keep alive the right of action against the executors.

Judgment of STREET, J., 30 O. R. 532, 19 Occ. N. 174, reversed.

S. H. Blake, Q.C., and *J. W. St. John*, for the appellant Riseborough.

R. T. Harding, for the appellant Bellamy.

Clute, Q.C., and *Skeans*, for the respondent.

STEWART v. SNYDER.

Executors and administrators—Notice to claimants—R. S. O. c. 129, s. 38—Limitation of actions—Trustee Limitation Act—R. S. O. c. 129, s. 32—Trustee Relief Act, 62 V. c. 15 (O.)—Reversionary interest.

A notice by executors that "all parties indebted to the estate of the late (testator) are required to settle their indebtedness" by a named date, and that "parties having claims against said estate are also required to file same by said date," is not a sufficient notice within s. 38 of R. S. O. c. 129 to protect the executors from liability for claims not brought to their knowledge until after the estate has been distributed by them.

Their liability in this respect extends to claims against their testator for money lost owing to a breach of duty by him as trustee.

Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good money lost owing to his negligence, and the Trustee Limitation Act does not run against them from the time of the

loss, but only from the time their reversionary interest becomes an interest in possession.

After judgment had been given in the Court below (30 O. R. 110, 18 Occ. N. 407), against the executors in this case, the Act for the Relief of Trustees, 62 V. c. 15 (O.), was passed:—

Held, that, assuming the Act to apply to such a case, it did not relieve the executors, for they could not be held to have acted reasonably when they failed to follow the plain statutory directions as to notice to creditors and claimants.

Judgment below affirmed.

DuVernet, for the appellants.

M. Houston and *R. M. Thompson*, for the respondents.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., FALCONBRIDGE, J., 18TH JULY, 1900.

PLESTER v. GRAND TRUNK R. W. CO.

Railways—Farm crossing—51 V. c. 29, s. 191—"Farm purposes"—Injury to stranger—Duty—51 V. c. 29, s. 289.

The defendants having, in compliance with the requirements of s. 191 of the Railway Act of Canada, 51 V. c. 29, made, and assumed the duty of keeping in repair, a crossing over their railway where it crossed a certain farm, nevertheless allowed it to get into an unsafe and defective condition, whereby a horse of the plaintiff was injured. The plaintiff was at the time using the horse, with the permission of the owner of the farm, in hauling gravel from a part of the farm to the highway, for which purpose it was necessary to cross the railway.

Held, without deciding whether the right of user of such a crossing is limited to a user for farm purposes, but assuming it to be so limited, that the hauling of gravel was, under the circumstances, a farm purpose, and that the defendants owed a duty, even apart from s. 289, towards one using the crossing by invitation of the owner.

W. Nesbitt, Q.C., and *H. E. Rose*, for the defendants.

Buckingham, for the plaintiff.

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[WEATHERBE, J., 10TH JULY, 1900.

MOORE v. MURPHY.

Pleading—Striking out defence—Falsity.

Application to strike out paragraphs of defence as false. Action on a contract. Defence: "never agreed." The defendant's affidavit disclosed that his defence was that a tender of a contract he had made had never been accepted by the plaintiff.

Held, that under the circumstances there was matter for trial, and that the paragraphs complained of should not be struck out.

Sangster, for the plaintiff.

Cluney, for the defendant.

In re DONKIN.

Infant—Sale of lands—Requisites—Price.

Upon an application in Chambers to sell the lands of an infant, the character of the lands sought to be sold and their value should be clearly put before the Judge on affidavit, and no matter how seemingly good a proposed sale may be, it should be shewn that the lands have been open to competition among prospective buyers in the vicinity of the lands before an order to sell to an individual will be granted.

S. D. McLellan, for the applicant.

[GRAHAM, E. J., 4TH JULY, 1900.

MATTHEWS v. METROPOLITAN CONTRACTING CO.

Absconding debtor—Attachment—Insufficient affidavit—Waiver—Appearance —Bond.

An application to set aside an attachment.

H. C. Borden, for the applicants.

GRAHAM, E. J.—This is an application to set aside an attachment. The affidavit simply alleges "that the said defendant company are absent or absconding from the Province of Nova Scotia." I think it should have contained statements bringing the defendants within Order 47, Rule 1 or Rule 6.

The defendants have appeared to the action, and have given a bond to relieve the property under Order 46, Rule 20. That Rule would apply if the case had been brought within Order 47, Rule 6.

It is said that there was a waiver by appearing and putting in this bond. There are many American cases both ways. But there is a principle about waiver. A party must not, after an irregularity committed by his opponent, take a step or do anything which will lead his opponent to suppose that no advantage will be taken of the irregularity, and to proceed to incur expense on that supposition. Then, on Tuesday the 15th May, notice of motion to set aside the proceedings was served, and appearance was not entered until the 17th. It is true the bond to relieve the property was given on the 9th but that step was taken under the pressure of the plaintiff's irregular process, and giving a bond is provided for by the Rule in all cases. To require a person to remain in prison until an order to hold to bail is set aside for irregularity is not, as I understand it, the practice, and I think that where property is seized the rule should be the same. The person has no feasible alternative, owing to the plaintiff's action. I think this practice is convenient and will prevent steam shovels and water wheels of mills from being seized and compelled to remain idle until a Judge's decision can be obtained.

The writ of attachment, levy, and bond will be set aside; the costs to abide the event.

[5TH JULY, 1900.

MONTREAL TRADING STAMP CO. v. CITY OF HALIFAX.

Constitutional law—Provincial statute—Amendment to municipal charter—Interference with trade—Prohibition of "trading stamps."

By s. 2 of c. 57 of 62 V. (N. S.), amending the charter of the city of Halifax "No person * * * shall give, sell, or dispose of trading stamps, tickets, or cards to any person * * * doing business in the city of Halifax. Nor shall such person so doing business in the city of Halifax take or have in his possession any such trading stamp * * Nor shall any vendor give, sell, or dispose of any such trading stamp * * * to any of his customers whereby such customer shall be entitled to receive for such trading stamp * * * any money, personal property, * * * The Trading Stamp Company, so called, is prohibited from doing business in the city * * * Any person violating this section shall be imprisoned in the city prison for nine months with hard labour."

The plaintiffs entered into a contract with several merchants in the city of Halifax to supply them with trading stamps at 50 cents per hundred, they undertaking to supply free to their customers on demand a trading stamp for every 10 cents worth of goods bought by the customers. When the customer has accumulated the book full of trading stamps, about 990, he is entitled to receive from the Trading Stamp Company a premium in goods of sorts, that is to say, triple plated silverware, etc. The plaintiffs print and circulate a directory containing the names of the merchants dealing with them. On behalf of the plaintiffs, John F. Ryan, one of the merchants, made an affidavit that two policemen of the city force notified him that if he did not cease giving trading stamps or dealing with them he would be prosecuted under the Act. He ceased dealing in the stamps. The manager made affidavit that the company had contracts with 18 merchants, and produced a directory explaining the system.

A summons was taken out for an injunction to restrain the city from threatening to prosecute and from inducing people to violate their contracts with the plaintiffs. A police sergeant and policeman were joined as parties.

It was contended that the Act was *ultra vires* the Provincial Legislature.

GRAHAM, E.J.—In my opinion this Act comes within the head "Property and Civil Rights" or "Matters of a merely Local or Private Nature within the Province," and it is not a criminal law: *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1896] A. C. 364; *Regina* v. *Wason*, 4 Cart. 578; *Keefe* v. *McLennan*, 2 Cart. 400.

Then it was contended that it was illegal for the city to send a policeman to notify a citizen to desist from violating a provision of the charter or he would be proceeded against under the Act. There is no evidence of any illegal act on the part of the city by policemen.

The summons will be dismissed; the costs of the parties to abide the event.

[6TH JULY, 1900.

MILLER v. ARCHIBALD.

Costs—Payment into Court—Acceptance—Notice.

After the full Court had rendered judgment (*ante* 136), reversing the decision of HENRY, J., (19 Occ. N. 400), the plaintiffs delivered a reply accepting the money paid into Court. The amount paid in was $1. This reduced the action to a question of costs.

Held, that Order 22, Rule 6 (*b*), latter part, applied to this case. It was the case of a delivery of a reply accepting the money and not a case for notice. This was not a case where the plaintiff should be deprived of his costs.

Borden, Q.C., for the plaintiff.

Harris, Q.C., for the defendant.

[MEAGHER, J., 10TH JULY, 1900.

STUBBINGS v. UMLAH.

Mortgage—Sale under decree—Death of defendant after decree—Necessity for revivor.

Motion to confirm the sheriff's report on sale in a suit for foreclosure and sale of lands under a mortgage. While the lands were under advertisement of sale in pursuance of the decree of foreclosure and sale, which was in the usual form, the defendant died intestate. The plaintiff did not take any step to revive or continue the action, but proceeded with the sale as if the death had not taken place, and upon the sale purchased the property.

Counsel appeared upon the motion to confirm, and asked to be heard in opposition to it on behalf of the father of the deceased defendant, who, upon the death, became entitled to the equity of redemption. The Judge thought that there was some doubt about his right to be heard, but the question being new to him, he decided to hear him as *amicus curiæ*.

The contention made was that upon the defendant's death the suit became defective for want of parties, and the sale could not be legally proceeded with and could not therefore be confirmed, and at any rate a deficiency was claimed for, and that fact, even under the American cases, rendered a revivor necessary.

The contention in reply was, that the decree as to the sale was, in effect, a final order, the equivalent of an English foreclosure order absolute, and extended to the interest of all parties claiming under the defendant, and therefore a legal sale could take place notwithstanding the death, and that under the decree or order the sale related back to the date when it was made.

Held, that there is this distinction between the Nova Scotia decree and the English final order, that under the former the right of redemption exists absolutely pending the sale and final confirmation thereof, while under the latter no such absolute right exists.

Held, further, that the father could have exercised the only right that passed to him upon his son's death without being a party to the suit, unless the plaintiff refused to recognize his right, when he would need to ask the aid of the Court. The plaintiff would at his peril refuse him the right to redeem.

Held, further, following *Harrison* v. *Simons*, 3 Edwards Ch. (N.Y.) 416, *Grant* v. *Griswold*, 21 Hun, and *Hays* v. *Thomas*, 56 N. Y. 521, that where a judgment of foreclosure and sale makes no provision as to a deficiency, the death of the mortgagor does not render necessary an application to revive. No claim for deficiency could be found on examination of the papers in this case.

Held, that *Alward* v. *Lewis*, [1891] 2 Ch. 81, could be distinguished by considering the difference in terms between the Nova Scotia form of decree and that of an English foreclosure order *nisi*, namely, that in one there is an actual adjudication, subject only to be defeated by redemption, while in the other the adjudication is not made until the final order passes.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 12TH JULY, 1900.

PARENT v. BOURBONNIERE.

Vendor and purchaser—Suit for instalment of purchase money—Default—Sale by vendor to third person.

County Court appeal. The plaintiff sued for an instalment of the purchase price of a parcel of land. The agreement was under seal, and the defendant covenanted to pay the price in certain specified instalments. The plaintiff

stated in his evidence that three weeks after the instalment sued for became due he sold the land to a third person. It appeared that this resale was under a written agreement. The agreement of sale to the defendant provided that, upon default in payment, the plaintiff might determine the contract by notice in writing sent by post to the defendant. It was not shown that any such notice was given, nor was it proved that the plaintiff in any way communicated to the defendant the fact of a resale or of any intention to rescind the contract or to refuse fulfilment.

The County Court Judge entered a verdict for the plaintiff.

Held, reversing his judgment, that if, when the contract of sale to the defendant was made, or subsequently, before or after the defendant's default, the plaintiff had no title or right to call in and convey the title, he could not recover the price: *Brewer* v. *Broadwood*, 22 Ch. D. 105; *Farrer* v. *Nash*, 35 Beav. 167. The plaintiff stated in positive terms that he had sold the place again, and that there was a verbal agreement with the new purchaser not set out in the writing, that if the defendant paid in four or five days, the agreement would be cancelled. The time passed, the defendant did not pay, and presumably the agreement was intended to be absolute. Such an agreement should be treated as so far an abandonment of the first agreement that the vendor could not thereafter sue upon it, although not directly communicated to the defendant.

Ewart, Q.C., for the defendant.

Forrester, for the plaintiff.

[BAIN J., 20TH JUNE, 1900.

SINCLAIR v. PRESTON.

Interest—Recovery of—Debt payable at a "certain time" under a writing—Error in contract—Reformation.

The plaintiffs sued to recover a balance for work done under a contract with the defendants, dated the 12th

October, 1889, for the building of fences and gates along the line of the Great North-West Central Railway.

Prior to the making of the contract the defendant Preston had entered into a contract with one Charlebois for the building of the fencing, and Preston took the defendant Musson into partnership with him for carrying out the same, and then the defendants sublet the work to the plaintiffs.

The contract contained the following provision for the payment of the plaintiffs for their work: "Estimates for the said work shall be made monthly by the company's engineer, or at such other times as said engineer shall deem reasonable and proper, and such estimates, less ten per cent. rebate, shall be paid forthwith, upon same being paid to said Preston and Musson by said company, and the said ten per cent. rebate shall be paid forthwith upon the same being paid to the said Preston and Musson by the said company." Charlebois on the 28th September, 1891, recovered a judgment in the High Court in Ontario, which declared that he had a lien on all property of the railway company for the amount due him: in that judgment the company were ordered to pay W. A. Preston, fencing contractor, $8,400, the said Preston "hereby accepting the provisions of this judgment by his solicitor and counsel in full of his claim against the said plaintiff."

The $8,400 was not paid until 1898, but the plaintiffs contended that Preston by accepting the judgment put it out of his power to insist that the estimate for the balance of the work should be given and paid, and that, as far as the defendants were concerned, this judgment was equivalent to payment to Preston or the defendants, and therefore that the plaintiffs were entitled to be paid interest on the whole balance of $6,914 that was due to them under the contract at the date the judgment was recovered. It was the defendant Preston, and not both defendants, who accepted the judgment,

Held, that, as the original contract was between Preston and Charlebois, and he was the one with whom Charlebois dealt in the matter, Musson, the other defendant, must be

held to have been bound by Preston's acceptance of the judgment, just as he would have been by a payment made by Charlebois to Preston. At the time the judgment was taken, the plaintiffs had done all the work under their contract to the satisfaction of the engineer in charge, and Preston was entitled to have had a final estimate and payment of the balance. Preston alleged that the engineer was withholding the final estimate, so that an action could not be brought against Charlebois; if under the circumstances Preston chose to accept the judgment against the company in full satisfaction of his claim against Charlebois, it seemed only reasonable that it should be considered as between him and the plaintiffs that he was then paid the balance that was due on the contract.

The word "company" was clearly used in the contract in error for Charlebois, and the contract should be reformed; it was drawn by the solicitor for the defendants, and in his statement of defence Preston admitted that it was with Charlebois he had the contract; the evidence shewed clearly that the word "company" was used in error for Charlebois.

When Preston accepted the judgment against the company on the 28th September, 1891, the defendants became liable to pay the plaintiffs the balance of $6,914 that was then unpaid for their work, and the plaintiffs should be allowed interest on this amount for six years. Though the contract did not specify the day of payment, it specified the event upon which payment was to be made to the plaintiffs, and the money was thus "payable by virtue of a written instrument at a certain time:" *Duncombe* v. *Brighton Club Co.*, L. R. 10 Q. B. 371.

Ewart, Q.C., and *Wilson*, for the plaintiffs.

BRITISH COLUMBIA.

In the Supreme Court.

[DRAKE, J., 26TH JUNE, 1900.

In re ST. EUGENE MINING CO.

Mines and minerals—Conveyance of land—Effect of—Precious metals.

Reference to a Judge in Chambers under s. 82 (*b*) of the Land Registry Act by S. Y. Wootton, Registrar-General, as to the effect of certain conveyances.

Held, that where the precious metals have been passed out of the Crown to a grantee, a conveyance of the land by the latter to a third person in the ordinary form will pass the precious metals, although not specially mentioned.

Barnard, for the company.

The Registrar-General, in person.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[FERGUSON, J., 2ND JULY, 1898.

LYLES v. WINDSOR FAIR GROUNDS AND DRIVING PARK ASSOCIATION.

Contract—Use of race track—Lease or license—Construction of document—Nature of possession—Forfeiture.

An agreement under seal made between the defendants, an incorporated association, of the first part, and the plaintiff and another, of the second part, dated the 4th March, 1897, recited that the latter were desirous of obtaining so much of the grounds and track of the association as might be necessary for the purpose of conducting race meetings during the season of 1897, for the days and times thereinafter mentioned, and had agreed to pay therefor $2,000 and a quarter of the net profits of such venture for such use, subject to the terms and conditions thereinafter mentioned. The agreement then provided:—

(1) That the parties of the second part should have the permission to use the race track and so much of the said grounds, barns, and buildings of the association as might be necessary for the purpose of holding race meetings commencing on the 1st May, 1897, and thence up to the 1st November, 1897, subject to the terms and conditions thereinafter mentioned, upon payment of $2,000, etc., and that

the parties of the second part should provide and keep proper books of account and employ a book-keeper first approved of by the association, whose duty it would be to make all necessary and proper entries in the books of all transactions which would relate to or be incidental to the said race meetings, and to which books the association should have access, and that a balance sheet should be prepared, etc., and the parties of the second part should pay to the association one-quarter of the net profits or proceeds of such race meetings and of all matters incidental thereto, in addition to the money *rental* of $2,000.

(2) That the race meetings should be conducted in a manner specified and set out.

(3) That the race meetings should not be held at certain times.

(4) That the betting privileges should be let in a manner specified and set out.

(5) That the parties of the second part should, at their expense, keep a night watchman on the premises for the safety of the buildings, and should observe and conform to all the requirements of the insurance companies having risks thereon.

(6) That if additional barns or other improvements were required by the parties of the second part, they should provide the same at their own expense, but under the directions of the association, whose property such barns or improvements should be and remain.

(7) That the number of races per day should be as specified.

(8) That the parties of the second part should keep in repair the track, grounds, buildings, fences, and all other equipments and property of the association and deliver the same back in as good shape and repair as when taken, and the president and directors of the association should at all times have access to the track, grounds, and buildings to view state of repair or for any purpose whatever, and the parties of the second part should repair and otherwise comply with and

observe the requirements of this agreement as might be required of them; and the shareholders should be allowed free entry to race meetings.

(9) That the president and directors of the association should have free access as aforesaid, and might require performance and observance of all the covenants, terms, and conditions of the agreement, and the parties of the second part should immediately comply with such requests as aforesaid, and in case of non-performance or non-observance or in case of any breach or violation of the terms and conditions of this agreement in any respect, it should become null and void and of no effect, and the association should be entitled to resume possession and, if necessary, to enforce *delivery of such possession under the Act respecting overholding tenants,* and the then current *rental* should immediately become due and payable.

(10) That in case the parties of the second part should, without the consent of the association, cease racing or neglect to continue their race meetings for the space of fifteen days, save for the purposes hereinbefore mentioned, they should cease to have any rights under this agreement, and, unless they give notice of such abandonment, they should be liable to pay at the rate of $30 per day for every day of such abandonment without notice, and the association might resume possession at any time after such notice or after the expiration of such period of fifteen days.

(11) That this agreement should not interfere with or affect the rights and privileges of the lessee of the club house and premises and other things mentioned in his lease.

(12) That this agreement or the rights thereunder should not be sold, transferred, assigned, or sublet without the consent, first had, of the association in writing.

During the currency of the period the association, by a resolution of their board of directors, at a meeting held in accordance with their by-laws, declared the agreement void and at an end, and served upon the plaintiff a notice stating that the plaintiff and the other party of the second part had

violated the agreement in certain ways and manners specified and set out, and that the association had resumed possession of the track and of the lands and premises in connection therewith, and had declared the agreement null and void.

Held, that the agreement was not a lease, but a mere license, and the relationship of landlord and tenant did not exist between the contracting parties.

The granting part was free from ambiguity in respect of the character and quantity of the interest that was intended to pass by it; it is the proper office of this part of the deed to denote what the premises or things are that are granted, and it is the place where the intent of the grantor and what he has actually done in that respect is more particularly to be looked for; recourse must be had to the proper and efficient part of the deed to see whether the grantor has actually granted what it is urged that his expressions denote that he supposed he had granted, for the question properly is not what he supposed he had done, but what he really has done by his grant. There was nothing in the granting part of this document shewing a grant of the exclusive right of entry or the exclusive right of possession during the period indicated. The privilege of using for certain defined purposes was what and all that was granted by these words, and this fell short of what is necessary to constitute a lease.

Even if the granting words were considered ambiguous, there was nothing in the other parts of the document of sufficient force and clearness to enlarge or explain the meaning of the granting words in such a manner as to show that the document was a lease.

The provisions in regard to a night watchman, to additional barns or improvements, and to keeping the track, grounds, buildings, fences, and equipments in repair and delivering them up in as good shape and repair as when taken, were all reconcilable with the view that the document was a license only, and not a lease; and, besides, there was a provision for access and entry at all times and for any purpose whatever.

The provision in the forfeiture clause that, in the event of a breach, the association should be entitled to resume

possession, only meant that the association should have the right to resume such possession as the grantees should have, which clearly was not an exclusive possession. The words, "and, if necessary, to enforce delivery of such possession under the Act respecting overholding tenants," could not, taken alone, have the effect of stamping the character of a lease upon the instrument. These words merely pointed to a supposed ready method of getting from the grantees such possession as at the time they might have.

Held. also, upon the evidence, that there was a breach of the contract, for which the defendants might properly forfeit, and that the contract was in law properly forfeited and declared void by the defendants.

Watson, Q.C., for the plaintiff.

Riddell, Q.C., for the defendants.

[ROBERTSON, J., 8TH JUNE, 1900.

In re McARTEE AND TOWNSHIP OF MULMUR.

Liquor License Act—Local option by-law—Omission to nominate deputy returning officers in—Defect—Quashing.

When a by-law requires the assent of the electors, the deputy returning officers to take their votes should be named in the by-law; and a by-law passed under s. 141 of the Liquor License Act, R. S. O. 1897 c. 245, from which their names were omitted, was quashed, even although deputy returning officers were subsequently appointed by a general by-law.

Haverson, for the applicant.

G. M. Vance, for the township corporation.

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[RITCHIE, J., 2ND AUGUST, 1900.

REGINA v. BURTRESS.

Justice of the peace—Jurisdiction—Assault—Summary trial—Consent of accused—Amendment—Conviction—Costs—Hard labour—"Forfeit and pay."

Charles Burtress is convicted before the undersigned for magistrate for Truro with having committed a violent assault upon Harvey Burris. He consented to be tried summarily under part LV. of the Criminal Code, and was tried and convicted.

The conviction was as follows: "Be it remembered that Charles Burtress is convicted before the undersigned for that he, the said Charles Burtress, did in Truro aforesaid commit an aggravated assault upon Harvey Burris, and I adjudge the said Charles Burtress for his said offence to be imprisoned in the county gaol at Truro . . . and there kept at hard labour for the period of two months, and also to pay a fine of $5 to be paid and applied according to law, and also to pay to the said Harvey Burris the sum of $7.75 for his costs in this behalf; and if the said sum of $5 and costs be not forthwith paid, I adjudge the said Charles Burtress to be imprisoned in said county gaol for the further period of one month with hard labour, unless the said sum of $5 and costs be sooner paid."

On this conviction a warrant of commitment was issued, and Burtress was arrested and imprisoned. This was an application on the return of a *habeas corpus* for his discharge under R. S. N. S. c. 117, he being, as he alleged, illegally detained in custody.

RITCHIE, J.—The first ground relied on was that the warrant was bad, and was not based on a valid conviction, because it did not appear therein that the magistrate had jurisdiction to impose such a penalty, it not having been stated that the trial took place with the consent of the accused. No doubt the general principle is that the conviction must shew the jurisdiction of the magistrate, but in this case I think the defect is covered by s. 800 of the Code. In this case it is admitted that the accused did consent to his being tried summarily for the offence, and this defect is merely an omission to state what actually took place at the trial, and is, in my opinion, within the terms of the section, and the conviction is in that respect good and valid. A similar point was, I think, raised last winter in a case under part LVI. of the Code, where a conviction was sustained which omitted to shew the jurisdiction by stating that the accused appeared to be under sixteen years of age.

Another ground was that the magistrate had no authority to award costs, but I think that s. 788 of the Code, which defines the punishment clearly, implies that costs are to be awarded and I find that the same view has been taken in Ontario: see *Regina* v. *Cyr*, 12 P. R. 24.

A further ground was that the accused could not be sentenced to hard labour, in default of the payment of the fine and costs, and a decision of this Court was cited in support of such contention; but it will be found that the case relied on was under part LVIII. of the Code, in which the provisions are different, and I think a fair reading of s. 788 is that the imprisonment in default of the payment of a fine and costs is to be for a further term and of the same nature as that mentioned in the first part of the section. Besides this, s. 955, s.-s. 6, which applies to all imprisonments under Part LV. of the Code, leaves it to the discretion of the Court whether the imprisonment shall be with or without hard labour.

A still further ground taken was that the conviction was bad because it did not adjudge that the accused should *forfeit* and pay a fine of $5. In the schedule of forms given

to Part LV. of the Code there is none of a conviction which imposes a money penalty as well as imprisonment, but in all the forms of convictions on summary trials before justices or a stipendiary magistrate, in which a money penalty is imposed, the words of adjudication are that the accused "shall *forfeit* and pay," and I think that is the proper mode of stating it. This point has been decided in Ontario in *Regina* v. *Cyr*, 12 P. R. 24, and also by Mr. Justice Meagher in December, 1897, in the case of *In re Crowell*.

The accused has no merits whatever, and I am not without some doubt as to the validity of the last mentioned objection, but, as his liberty is at stake, I think it must prevail; and the said Charles Burtress will be discharged from custody under said warrant of commitment, on his giving an undertaking to bring no action against the magistrate or gaoler or the officers who executed the warrant.

BRITISH COLUMBIA.

In the Supreme Court.

[IRVING, J., JUNE, 1900.

BANK OF BRITISH COLUMBIA v. OPPENHEIMER.

Trial—Jury retiring—Evidence.

Trial by jury. The securities, the subject-matter of the action, having been lost after action brought, the plaintiffs were proceeding to prove the loss, when IRVING, J., proposed to allow the jury to retire pending the giving of the evidence. Counsel for the plaintiffs objected.

Held, that on a trial by jury after the plaintiffs' case has commenced the Judge may permit the jury to retire in his discretion while proof is being given of facts with which the Judge alone is concerned.

Sir C. H. Tupper, Q.C., and *Hunter*, for the plaintiffs.

Bodwell, Q.C., and *McPhillips*, Q.C., for the defendants.

Supreme Court of Canada.

QUEBEC.] [12TH JUNE, 1900.

ALLEN v. EVANS.

Will—Codicil—Testamentary succession—"Heirs"—Universal legatee.

R. A., who died in Montreal in 1896, had, by his will, made there in 1890, bequeathed to M. A. and her heirs, one-fourth of his residuary estate. M. A. died in 1895, leaving a will appointing five of her children her universal legatees. R. A. subsequently took communication of the will of the deceased M. A., and made a codicil to his own will in the terms following:—"With respect to the share of the residue of my property which I bequeathed by my will to my sister, the late M. A.,....my will and desire is that her said share of said residue shall go to her heirs."

Held, GWYNNE and GIROUARD, JJ., dissenting, that, under the provisions of the Civil Code of Lower Canada, the words "her heirs" in the codicil must be construed as meaning the persons to whom the succession of M. A. devolved as universal legatees under her will.

Judgment of the Court below reversed.

Casgrain, Q.C., and *Fitzpatrick*, Q.C., for the appellants.

Beique, Q.C., and *Cruikshank*, for the respondents.

BRIGHAM v. BANQUE JACQUES CARTIER.

Insolvency—Compromise—Secret agreement—Bribery.

A commercial firm having made an abandonment of its property for the benefit of its creditors under the provisions of the Code of Civil Procedure, a secret arrangement was made whereby a particular creditor, without any legal right to preference or priority, was secured an advantage over the other

creditors, through the assistance of one of the inspectors of the insolvent estate, to whom was promised a sum of money for his personal use upon his advising the acceptance of a proposal for the purchase of the estate upon a composition at a rate on the dollar to be paid to the creditors of the estate generally. The preferred creditor was, under the concealed arrangement, to receive an amount greater than the rate of the composition proposed, such additional sum to be paid by a third person who took no direct interest in the estate purchased.

Held, that the agreement was fraudulent and void; that the proposed payment by the third person was as much a fraud upon the general body of the creditors as if it had been promised by the insolvent firm itself; and that the additional sum could not be recovered by the creditor so preferred.

Held, also, that the promise of the payment to the inspector was a bribe, and, for that reason alone, the transaction to induce which it was given should be adjudged corrupt, fraudulent, and void.

Judgment of the Court of Review, at Montreal, reversed.

PARSONS v. HART.

Ship—Bill of lading—Ship's agent—Mandate—Custom of port—Delivery—Carriers.

A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons in whose interests it would be to have a knowledge of its existence, and, in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against the custom.

Judgment of the Crown below reversed, STRONG, C.J., dissenting.

Atwater, Q.C., and *Duclos*, for the appellant.

Macmaster, Q.C., and *F. S. Maclennan*, Q.C., for the respondent.

McFARRAN v. MONTREAL PARK AND ISLAND R. W. CO.

Married woman—Community—Personal injuries—Right of action—Pleading —Exception à la forme—Appeal— Questions of procedure.

The right of action for damages for personal injuries sustained by a married woman, *commune en biens*, belongs exclusively to her husband, and she cannot sue for the recovery of such damages in her own name, even with the authorization of her husband.

Where it appears upon the face of the writ of summons and statement of claim that the plaintiff has no right of action, it is not necessary that objection should be taken by *exception à la forme*. Absolute want of legal right of action may be invoked by a defendant at any stage of a suit.

Judgment of the Court of Queen's Bench, 3 Q. P. R. 1, reversed on the *motifs*, but affirmed in the result.

Macmaster, Q.C., and *F. S. Maclennan*, Q.C., for the appellant.

Stuart, Q.C., and *F. McLennan*, for the respondents.

KING v. McHENDRY

Marriage laws—Community — Continuation of community — Inventory — Procès-verbal de carence—Tripartite community.

At the time of the dissolution of community by the death of one of the consorts in 1845, the common assets consisted of bare necessaries of small value and exempt from seizure. There was no inventory or *procès-verbal de carence* made, and, subsequently, the survivor contracted a second marriage. In an action by a child of the first marriage claiming a share in continuation of community:—

Held, that there was no necessity for an inventory of property of such insignificant value, and that failure to make an inventory or *procès-verbal de carence* did not, under the circumstances, effect a continuation of community.

Judgment of the Court below reversed.

Migneault, Q.C., and *Beaudin*, Q.C., for the appellant.

Monk, Q.C., and *Pelletier*, for the respondents.

DINGWALL v. McBEAN.

Partnership—Agency—Factor—Pledge—Lien—Notice—Right of action—Intervention—Res judicata.

A partner intrusted with possession of goods of his firm for the purpose of sale may, either as partner in the business or as factor for the firm, pledge them for advances made to him personally, and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods, notwithstanding notice that the contract was with an agent only.

Where a consignment of goods has been sold and they remain no longer in specie, the only recourse by a person who claims an interest therein is by an ordinary action for debt, and he cannot claim any lien upon the goods themselves nor on the price received for them.

The plea of *res judicata* is good against a party who has been in any way represented in a former suit deciding the same matter in controversy.

Judgment of the Court below affirmed.

Leet, Q.C., for the appellant.

Greenshields, Q.C., and *Dickson*, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[20TH DECEMBER, 1899.

DUEBER WATCH CASE M'F'G. CO. v. TAGGART.

Evidence—Leave to adduce, after judgment in appeal—Rule 498.

After the judgment of the Court of Appeal affirming the judgment of the trial Judge dismissing the action, had been pronounced, drawn up, and entered, and while an appeal was

pending therefrom to the Supreme Court of Canada, the plaintiffs moved for leave to adduce further evidence for the purpose of shewing that an exhibit which was used as part of the evidence in the case was not a true copy of the original document. It was not suggested that there was any error in the judgment of the Court of Appeal which could be corrected by the introduction of the proposed evidence, or that, if the proposed evidence had been given while the appeal was pending, the judgment would have been different. It might tend to displace one of the grounds on which the trial Judge relied, or might prevent the defendants from relying upon that ground if the case went further, but that was all that could be said.

Held, that the application should be refused.

Rule 498, which empowers the Court to receive further evidence, is clearly confined to cases where such evidence is sought to be introduced for the purpose of the appeal.

C. Millar, for the plaintiffs.

J. A. Mills, for the defendants.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., MCMAHON, J., 17TH MAY, 1900.

LARKIN v. LARKIN.

Mechanics' lien—Trial—Procedure—Mortgagee—Materials on land.

The procedure for the trial of an action under the Mechanics' and Wage-Earners' Lien Act, R. S. O. c. 153, is the ordinary procedure of the High Court, which is not affected by ss. 35 and 36 of the Act; and therefore a mortgagee against whom relief is sought must be made a party to the action within the time limited by s. 24, s.-s. 1.

Materials were placed on the land by the owner thereof and paid for by the mortgagee, to be used in the construction of buildings being erected thereon, but not actually incorporated therein. The materials were taken by the owner

a garnishing order absolute, stating that nothing was due from the corporation to the debtor at the time of service of the attaching order. Cross-examined upon his affidavit, the affiant said that the debtor was assessment commissioner for the corporation and in receipt of a salary, but that advances had been made to him on account of it, by the authority of the treasurer of the city, so that nothing was due. The affiant declined to answer certain questions put to him on cross-examination.

Held, that the affiant should be compelled to answer all questions put to him bearing in the advances made in the past to the debtor, and those bearing on the affiant's authority to make them, and his motives in doing so if he were exercising a discretion.

Held, also, STREET, J., dissenting, that the affiant should answer the question whether he had ever made advances on account of salary to any other employee of the city, and, if he should answer it in the affirmative, he might be further interrogated as to the number of such instances, but he was not to be compelled to disclose the names of persons to whom such advances had been made.

Held, also, that the affiant was not compellable to produce any of the city by-laws, not being the custodian thereof.

S. W. McKeown, for the judgment creditor.

Lindsey, Q.C., for the judgment debtor and the witness.

H. L. Drayton, for the garnishees.

[FALCONBRIDGE, C.J., STREET, J., 15TH SEPTEMBER, 1900.

TOWNSHIP OF TILBURY WEST v. TOWNSHIP OF ROMNEY.

Stay of proceedings—Prior action pending—Parties.

In this action the plaintiffs sought to recover from the defendants a large sum of money, being the portion assessed upon the defendants of the cost of certain drainage works constructed and paid for by the plaintiffs. In a previous action against the same defendants, the plaintiffs therein,

who were landowners in the defendants' township and assessed for a portion of the sum now sued for, sought a declaration that the defendants' by-laws purporting to impose this assessment upon the plaintiffs therein, and all the proceedings upon which they were founded, were void, and an injunction to restrain any proceedings for the collection of the amount for which the plaintiffs therein were assessed. In that action judgment had been given in the defendants' favour, but the plaintiffs had an appeal to the Supreme Court of Canada pending when the present action was brought.

Held, that the present action should not be stayed until after the determination of the appeal in the other.

DuVernet, for the plaintiffs.

Aylesworth, Q.C., for the defendants.

[BOYD, C., 21ST JUNE, 1900.

TOWN OF WHITBY v. GRAND TRUNK R. W. CO.

Railway company—Bond of provisional directors—Consideration—Bonus—Conditions—Liability to perform—Amalgamation with other companies.

A railway company, by the bond of its provisional directors, in consideration of a bonus in aid of the company, agreed to erect and maintain workshops during the operation of the railway.

The company, after certain changes of name, amalgamated with other companies, and formed a larger one, which ceased to maintain the workshops.

That company subsequently amalgamated with and became part of the defendants' company.

Held, that the bond of the provisional directors of the first company was a corporate one binding on its successors, and by consequence on the defendants, who had acquired the road.

That the road, though it formed part of a larger railway connection represented by the defendants, was still in operation, and, as the contract was to maintain the workshops

during the operation of the railway, it remained a binding engagement; and a reference to ascertain the damages, if any, for breach of the covenant, was directed.

Aylesworth, Q.C., for the plaintiffs.

Walter Cassels, Q.C., for the defendants.

[MEREDITH, C.J., 16TH JULY, 1900.

In re CRAWFORD—NELSON v. BELL.

Trusts and trustees—Sale of lands—Approval of Court—R.S.O. c. 129, s. 39 —Rule 938.

Trustees, having unsuccessfully offered for sale *en bloc* property of the trust estate, consisting of a hotel and stores and a dock, and subsequently the hotel and stores without the dock, received an offer for the hotel by itself.

Held, on an application to the Court to approve and confirm the sale under R. S. O. c. 129, s. 39, and Rule 938, that the Court had jurisdiction to express its approval, and that, under the circumstances, it was a case in which the jurisdiction ought to be exercised.

W. H. Blake, for the trustees.

J. Hoskin, Q.C., for the infant.

[22ND SEPTEMBER, 1900.

STEWART v. JONES.

Receiver—Equitable execution—Claim against Crown—Distribution of fund —Creditors' Relief Act—Undertaking.

The plaintiff and defendant were partners, and as such had a claim against the Crown for work done, which resulted in the payment of a large sum. Subsequently the partnership made a further claim for interest on the sum paid, which was rejected, and could not have been enforced by a petition of right. The Crown, however, without admitting any liability, offered a sum in satisfaction of the claim for interest, and an appropriation was made by Parliament to enable

that to be done, but the appropriation lapsed. A Minister of the Crown afterwards offered to pay the defendant half the amount of the appropriation, and the defendant agreed to accept it. Accordingly a sum was granted by Parliament for this purpose, and by an order-in-council authority was granted to pay it to the defendant.

Held, that on the date of the order-in-council there existed a debt due by the Crown to the defendant, arising out of contract, and recoverable by petition of right.

Held, also, that this sum could be made available for satisfaction of a judgment recovered by the plaintiff against the defendant.

Willcock v. *Terrell*, 3 Ex. D. 323, and *Manning* v. *Mullins*, [1898] 2 Ir. R. 34, followed.

The fact that the Crown is the debtor does not stand in the way of the Court going as far as it can go, without directing or assuming to direct what shall be done by the Crown, towards making such an asset of a judgment debtor available to satisfy the claim of his judgment creditor.

Upon the plaintiff undertaking that the fund, if and when it should come to the hands of the receiver, should be applied as if it had come to the hands of the sheriff under the Creditors' Relief Act, an order was made restraining the defendant from receiving the fund, authorizing a receiver to receive it, and providing that his receipt should be a sufficient discharge to the department or officer making payment.

J. H. Moss, for the plaintiff.

Shepley, Q.C., for the defendant.

J. *A. Paterson*, for the Crown.

[FERGUSON, J., 10TH JULY, 1900.

In re METCALFE—METCALFE v. METCALFE.

Will—Devise of residue—Executory devise—Event happening in part.

A testator by his will gave his wife a life interest in his estate, directed payment at her death of some specific legacies, and then provided: "The residue . . . I give, devise, and

bequeath as follows, that is to say; it shall be equally divided between my brothers R. M. and M. M., or in case of their dying before my . . . wife L. M., it shall be equally divided between the heirs of my brothers R. M. and M. M."

R. M. died in the lifetime of the widow, and M. M. survived her.

Held, that, as the event provided for, viz., the death of both R. M. and M. M. during the widow's lifetime, had not happened, the devise of the residue to R. M. and M. M. was not divested, and R. M.'s widow took his share under his will.

R. R. Hall, for the appellant, W. Long Metcalfe.

George J. Sherry, for Isabella Hughes.

W. A. F. Campbell, for the plaintiff and Phillip Metcalfe, William Metcalfe, and Ann Moore.

G. L. Smith, for Harold Metcalfe, Thomas Harding, and R. H. Greer.

HERMAN v. WILSON.

Mining company—Judgment against—Wages—R. S. O. c. 197, s. 8—Directors—Liability of—Manager—Dismissal of action—Rule 616.

A manager of a company is not a labourer, servant, or apprentice within the meaning of s. 8 of the Ontario Mining Companies Incorporation Act, R. S. O. c. 197.

An action brought against two directors of a mining company by such manager, who had recovered a judgment against the company for wages due him and payments made on their behalf to labourers and servants, and had subsequently obtained assignments of the amounts paid, was dismissed on a motion under Rule 616, on the ground that the action in which judgment was recovered was not such an action as is contemplated by s. 8.

C. C. Robinson, for the defendants.

W. J. Elliott, for the plaintiff.

[STREET, J., 14TH JUNE, 1900.

In re CURRY—CURRY v. CURRY.

Evidence—Corroborative evidence—Interested party—R. S. O. c. 73. s. 10.

In an action by or against the representatives of a deceased person, the corroborative evidence required by R. S. O. c. 73, s. 10, may be found in the other facts adduced in the case, raising a natural and reasonable inference in support of the evidence whereof corroboration is required.

Semble, also, that corroborative evidence within the meaning of that section may be given by an interested party, so long as he is not the party obtaining the decision.

O. E. Fleming and *J. H. Moss*, for Annie H. Curry and the executor of Cora Curry.

W. Nesbitt, Q.C., and *A. St. G. Ellis*, for the administrator of Emma Glen.

S. H. Blake, Q.C., and *Sutherland*, Q.C., for John Curry, executor of James R. Curry.

[10TH JULY, 1900.

CARSCALLEN v. WALLBRIDGE.

Will—Election—Widow—Separation deed.

A husband in a separation deed covenanted to pay his wife an annuity of $200 in half-yearly payments, and charged it on certain land; the wife accepting it in full satisfaction for support, maintenance, and alimony during coverture, and of all dower in his lands then or thereafter possessed.

The husband, by his will, subsequently executed, directed his executors to pay his wife $400 annually, $200 on the 1st June and December in each year during his life, and added: "which provision in favour of my said wife is made in lieu of dower."

Held, that the wife was not put to her election between the benefits under the deed and the will, but was entitled to both.

M. Wright, for the plaintiff.

Northrup, for the defendants.

[MEREDITH, J., 29TH AUGUST, 1900.

BOGART v. TOWNSHIP OF KING.

Assessment and taxes—Special rate—Bonus by-law—Duty of clerk—Collector's roll—Debentures, sale of—Failure of scheme.

While a by-law of a township corporation provided for the raising by the issue and sale of debentures of a certain sum to be paid by way of bonus to a railway company, and for the levying of an annual rate for the purpose of paying the debentures:—

Held, that it was the duty of the township clerk under s. 129 of the Assessment Act, without any further direction an authorization, to insert in the collectors' rolls the amount with which each ratepayer was chargeable under such by-law; and it was not necessary that the amount leviable each year under such by-law should be mentioned in the annual by-law authorizing the levy of sums for ordinary expenditure; and s. 402 of the Municipal Act had not the effect of making it necessary.

Clarke v. *Town of Palmerston*, 6 O. R. 616, distinguished.

2. That the rate could be levied notwithstanding that none of the debentures had been sold.

3. That the failure to collect the rate for the first year after the passing of the by-law did not cause the failure of the whole scheme.

Semble, that if the scheme should fail and nothing be paid to the railway company, the ratepayers could recover their money from the corporation.

S. H. Blake, Q.C., and *T. H. Lloyd*, for the plaintiff.

Shepley, Q.C., and *A. B. Armstrong*, for the defendants.

GRAND TRUNK R. W. CO. v. CITY OF TORONTO.

Constitutional law—Railways—Municipal corporations—Construction of highway across railway—Railway Committee of Privy Council—Railway Act of Canada, s. 14—Intra vires.

Upon the application of the defendants under s. 14 of the Railway Act of Canada for an order authorizing the

extension of a street in their city across the tracks of the plaintiffs, the Railway Committee of the Privy Council for Canada ordered and directed that the defendants "may have a temporary crossing, at rail level, for foot-passengers only, over the said tracks," upon certain conditions.

Held, that the Provincial Legislature alone had power to confer upon the defendants legal capacity to acquire and make the street in question.

2. It has conferred such capacity.

3. In virtue of its power over property and civil rights in the Province, the Provincial Legislature has power to authorize a municipality to acquire and make such a street, and to provide how and upon what terms it may be acquired and made.

4. But that power is subject to the supervention of federal legislation respecting works and undertakings such as the railway in question.

5. The manner and terms of acquiring and making such street, and also the prevention of the making or acquiring of such a street, are proper subjects of such supervening legislation.

6. Such legislation may rightly confer upon any person or body the power to determine in what circumstances, and how and upon what terms, such a street may be acquired and made, or to prevent the acquiring and making of it altogether, and therefore s. 14 of the Railway Act is not *ultra vires*.

7. Such legislation, in virtue of its power over such railway corporations, as well as such works and undertakings, may confer power to impose such terms as have in this case been imposed upon the plaintiffs, and to deprive such corporations of any right to compensation for lands so taken or injuriously affected; and has conferred such power on the Railway Committee, under s. 14, in such a case as this; which power has here been exercised to some extent.

8. Such legislation has not conferred upon the Committee power to give the temporary foot-way in question.

9. Nor any authority to delegate its powers.

10. The work it directs must be constructed under the supervision of an official appointed for that purpose by the Committee.

11. The railway company may, if they choose, construct the works directed, under such supervision, instead of permitting the municipality to do so.

H. S. Osler, for the plaintiffs.

Fullerton, Q.C., for the defendants.

BOOK v. BOOK.

Life insurance—Change of beneficiary—Preferred class—Beneficiary for value—R.S.O. c. 203, ss. 151, 159, 160—Will—Testamentary capacity—Premiums paid by beneficiary.

A person whose life was insured by a benevolent society in favour of his wife, a preferred beneficiary, though not stated to be so in the certificate, was unable or unwilling to keep the insurance in force, and the later assessments before his death were paid by the wife. By his will the assured gave the whole of the insurance moneys to one of his sons.

Held, that he had power to do so by virtue of s. 160 of the Ontario Insurance Act, R. S. O. c. 203.

The proviso at the end of s.-s. (2) shews that the section is applicable to the case of a beneficiary for value, and that those only who appear as such expressly on the policy are protected against the wide power to change beneficiaries conferred by the section.

Section 159 does not apply to a case of this kind, but only to a pledge of a policy before it has been declared to be for the benefit of any preferred beneficiary.

Section 151 is not to be read as conflicting with s. 160; the latter applies to a change confined to the class of preferred beneficiaries, and the former to a change in all other cases.

Held, also, that the evidence did not sustain the allegation that the testator's mind was affected by insane delusions respecting his wife and some of his children; nor the

theory that there was an abandonment of the husband's insurance on his own life and the substitution of an insurance by the wife upon his life.

It was conceded that the wife should have a return of all moneys paid by her to keep the certificate in force, with interest.

Teetzel, Q.C., for the plaintiff.

W. W. Osborne, for the defendants.

IN CHAMBERS.

[FERGUSON, J., 10TH JULY, 1900.

In re WRIGLEY.

Will—Gift to niece or heirs—Predecease of niece.

A testator, by his will, after a provision in favour of his wife for life, directed that at the death of his wife any money that might then be remaining should be equally divided and paid to two nephews and two nieces, naming them, or their heirs, executors, or assigns.

One of the nieces predeceased the testator, leaving a husband and children.

Held, that the gift to the deceased niece did not lapse, and that her heirs were entitled to her share, and that her heirs were those who would have taken her personal property under the Statute of Distributions in case of her dying intestate possessed of personal property.

F. W. Langmuir, for the Toronto General Trusts Corporation.

J. F. Edgar, for the next of kin of the testator.

F. W. Harcourt, for the infant children of Annie Lochead.

Millican, for the husband of Annie Lochead.

[ROSE, J., 11TH SEPTEMBER, 1900.

In re VANLUVEN AND WALKER.

Costs—Taxation—Mortgagor and mortgagee—Appeal.

No appeal lies from the taxation of a mortgagee's costs of proceedings under the power of sale in a mortgage, had under R. S. O. c. 121, s. 30.

A. R. Clute, for the mortgagor.

J. H. Moss, for the mortgagee.

[17TH SEPTEMBER, 1900

MURR v. SQUIRE.

Costs—Interlocutory order—"Costs in the cause"—Discretion of trial Judge.

The judgment of the trial Judge was in favour of the plaintiff, and was not appealed against. As to costs, it adjudged that the defendants should pay to the plaintiff the costs of certain witnesses, and continued: "This Court doth not see fit to interfere with the interlocutory orders disposing of certain costs throughout the action, nor make any further or other order as to costs."

Two interlocutory orders made the costs of applications "costs in the cause;" two made them "costs in the cause to the successful party;" one order provided that "the defendant do pay to the plaintiff the costs of this motion to be taxed in any event of the cause but on the final taxation of the costs herein."

It was conceded that the plaintiff was entitled to the costs made payable in any event.

Held, following *Dickerson* v. *Radcliffe, post* 390, that the costs made costs in the cause were subject to the disposition of the trial Judge, and under the judgment were not to be taxed to the plaintiff.

Held, also, that "costs in the cause to the successful party" did not mean more than costs in the cause; and, even if it did, the plaintiff was not a successful party.

Brotherton v. *Metropolitan District Railway Joint Committee,* [1894] 1 Q. B. 666, followed.

R. McKay, for the plaintiff.

J. H. Moss, for the defendant.

[19TH SEPTEMBER, 1900.

In re HUBBELL.

Interpleader issue—Parties—Onus.

Where the proceeds of a life insurance policy were claimed by the widow of the assured and also by an assignee for value, and it appeared that the assured had first made a declaration in writing on the policy devoting all the benefit to his wife, and had subsqeuently by writing assumed to limit such benefit to $1, and had then made the assignment to the other claimant:—

Held, that the latter should be plaintiff in an interpleader issue ordered to be tried between the claimants.

H. M. Mowat, Q.C., for the claimant Hubbell.

A. G. Slaght, for the claimant Russell.

W. F. Burton, for the insurance company.

[22ND SEPTEMBER, 1900.

EDSALL v. WRAY.

Venue—Residence of plaintiff—Statement of claim—Rule 529 (b).

Rule 529 provides that: (*a*) the plaintiff shall, in his statement of claim, name the county town at which he proposes that the action shall be tried; (*b*) where the cause of action arose and the parties reside in the same county, the place so to be named shall be the county town of that county.

Held, that the residence of the plaintiff at the time of the delivery of the statement of claim, and not at the time

of the issue of the writ of summons, is the time referred to in Rule 529 (*b*).

W. H. Blake, for the defendant.

Cattanach, for the plaintiff.

[MEREDITH, J., 29TH AUGUST, 1900.

In re HYNES—HODGINS v. ANDREWS.

Partition—Summary proceeding—Parties—Absentee—Guardian—Dispensing with service—Substituted service.

Where, in a proceeding for partition or sale of lands, begun by summary application, a person interested in the estate, not originally made a party, had been long unheard of, and there was uncertainty whether he were living or dead, an order was made by a Judge, under ss. 16 to 20 of the Partition Act, R. S. O. c. 123, which are expressly made applicable by s. 33 of the Judicature Act, R. S. O. c. 51, appointing a guardian and directing that he be served with an office copy of the judgment or order for partition, and notice, for the absentee.

Semble, that the Master to whom a reference is directed by the judgment or order has power to dispense with service of his warrant or of an office copy of the judgment: Rules 203, 659.

Smith v. *Houston*, 15 P. R. 18, discussed.

Semble, also, that the Court or a Judge has power to make an order for substituted service of an office copy of a judgment or order.

Coleridge, for the plaintiff.

Essery, for the defendants.

[30TH AUGUST, 1900.

DICKERSON v. RADCLIFFE.

Costs—Interlocutory order—"Costs in the cause"—Discretion of trial Judge.

Where an interlocutory order in an action directs that the costs of certain proceedings shall be "costs in the cause,"

that is not a final disposition of such costs in favour of the party who shall succeed in the action, but merely puts those costs in the same position as any other of the ordinary costs of the action. that is, leaves them to be dealt with in the discretion of the trial Judge under Rule 1130 and s. 119 of the Judicature Act, R. S. O. c. 51.

Koosen v. *Rose*, [1897] 1 W. N. 25, 76 L. T. 145, 45 W. R. 137, 13 Times L. R. 257, distinguished.

J. W. Bain, for the plaintiffs.

J. B. Holden, for the defendants.

[24TH SEPTEMBER, 1900.

TOLTON v. MACGREGOR.

Payment out of Court—Proof of age of applicant.

By decree of the 18th September, 1878, in a partition action, it was directed that the share of an infant defendant, J. F. M., should remain in Court, and the interest thereon should be paid to his father, a co-defendant, as tenant by the curtesy.

On the 24th September, 1900, J. F. M. and his father moved for payment out of J. F. M.'s share, upon the father's affidavit identifying the infant defendant as his son, J. F. M., and stating that J. F. M. was of age, having reached the age of twenty-one years on the 5th February, 1899, and that the father consented to payment out and released all his rights in the fund.

Held, that the proof of the age was not sufficient, the father not having stated his reasons for believing that the son was of age or referred to any family or other records in support of his statement, and the fact that the son was named as a party in the decree of the 18th September, 1878, was not conclusive proof that he was now of age.

H. W. Mickle, for the applicants.

In the Second Division Court in the County of Perth.

[BARRON, Co.J., 15TH SEPTEMBER, 1900.

McLAREN v. MILLER.

Promissory note—Alteration in date.

An alteration in the date of a promissory note by the payee, after signature, without the assent of the maker, does not avoid the instrument if it be made for the purpose of correcting a mistake and making the note as it was intended by all parties to be.

Action on a promissory note. Defence, that the instrument was materially altered by the payee after it had been signed by the defendant, and was therefore void. The note was in fact signed on the 1st January, 1896, and the parties to it intended that it should bear that date, but a form was used which had the figures "188" printed, and the figure "6" was added, no one noticing that the preceding figure was "8" instead of "9." It was a note for $50, at twelve months. Some time after it was signed, the payee altered the 8 to 9. This was without the assent of the defendant.

By s. 63 of the Bills of Exchange Act, 53 V. c. 33, "where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided . . ."

F. H. Thompson, for the plaintiff.

Mabee, Q.C., for the defendant.

BARRON, Co.J.—The date of a note or document is its true date, not a false or impossible date. This, I take it, is understood all through the cases wherein it is held that the alteration of the date is material. For example, in *Boulton* v. *Langmuir*, 24 A. R. 618, it was held that the changing by the payee of the date of a demand note to a later date was a material alteration, and made the note void; but in that case it was the true date that was altered. Mr. Justice Osler says (p. 625): "To alter the date of the note was to make it appear to be a different contract from that which the defendant had entered into." But, in the case in question, to

alter the date was to make it appear to be the exact contract the defendant had entered into, and not a different one, because the note was, in fact, signed on the 1st January, 1896, and not on the 1st January, 1886.

Now, there are said to be two cases in which an alteration, though in a material part, will not vacate an instrument. One of these cases is where the note is altered to correct a mistake, or supply an omission, and in furtherance of the original intention of the parties.

[Reference to *Aldous* v. *Cornwell*, L. R. 3 Q. B. 573; *Fitch* v. *Kelly*, 44 U. C. R. 578; *Merchants Bank* v. *Stirling*, 1 R. & G. 439.]

It is contended that an alteration can only be effected through the aid of the Courts; that the instrument could only be reformed on an application to the proper Court. That remedy, of course, was open to the plaintiff, and it appears that some Courts in the United States insist on this course from prudent motives, deeming it an element of risk which might lead to grave results to permit corrections to be made or omissions supplied by interested parties. But there are numberless authorities the other way, both in the United States and in England, proceeding on the view that, if the alteration is in furtherance of the intention of the parties, then the assent of the party to be charged is implied, and the alteration, even though it is in a material respect, will not vitiate the instrument: Chitty on Bills, p. 184; *London, etc., Bank* v. *Roberts*, 22 W. R. 402. "So it has been held that the alteration of the date of a note, made by the promisee, without the knowledge or consent of the promisor, merely to correct a mistake and make the note such as both parties intended that it should be, does not invalidate the instrument:" Am. and Eng. Encyc. of Law, 2nd ed., vol. 2, p. 211.

The judgment will therefore be for the plaintiff.

MANITOBA.

In the Queen's Bench.

[RICHARDS, J., 30TH AUGUST, 1900.

MILLER v. RURAL MUNICIPALITY OF WESTBOURNE.

Particulars—Action for tort—Rule 278 (c.)

The statement of claim alleged negligence by the defendants in the construction of a ditch along the highway in front of the plaintiff's land and neglect to keep such ditch in repair, in consequence of which a larger quantity of water was brought on to the plaintiff's land than would otherwise have naturally flowed thereon.

The defendants applied for particulars under the statement of claim.

The plaintiffs took the objections: (1) that Rule 278 (*c*) of the Queen's Bench Act, 1895, took the place of the former practice as to delivery of particulars, and that the defendants, if entitled to particulars, should have moved to strike out the statement of claim for non-compliance with Rule 278 (*c*); (2) that in any case the defendants were not entitled as of course to particulars in an action not arising out of contract, but that particulars in such a case should not be ordered unless on affidavits shewing that the defendants did not know for what the plaintiff was proceeding, and had no other means of ascertaining the nature of the plaintiff's claim, and that, as no such affidavit had been filed on this application, it should be dismissed.

Held, that Rule 278 (*c*) was not applicable; it only applied to a case where a defendant would under the former practice be entitled as of course to an order for particulars.

Although there seemed to be a tendency to grant orders for particulars in cases of tort more freely than formerly, there must still in each case be some special reason shown why the order should be made: *Brown* v. *Great Western R.*

W. Co., 26 L. T. N. S. 398. The bare statement that the absence of particulars embarrasses the defence, or that the defendants cannot frame their statement of defence without the particulars, is insufficient.

Metcalfe, for the plaintiff.

Hough, Q.C., for the defendants.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 31ST MAY, 1900.

GRUTCHFIELD v. HARBOTTLE.

Mining law—Failure to record transfer of mineral claim—Right of locator subsequent to such transfer—Mineral Act, ss. 9, 49, 50.

In May, 1897, B. located and recorded the "May Day" claim, and, six days after location, conveyed a half interest to the defendant by a bill of sale, which was not recorded till April, 1898. B.'s free miner's certificate lapsed in July, 1897, and in October, 1897, the plaintiff, a free miner, re-located the "May Day" as the "Equalizer" claim.

Held, reversing the decision of MARTIN, J., in adverse proceedings, that the defendant's title should prevail against the plaintiff's.

S. S. Taylor, Q.C., for the appellant.

Duff, for the respondent.

[MARTIN, J., 15TH AUGUST, 1900.

ATTORNEY-GENERAL v. DUNLOP.

Judgment—When delivered.

After the trial of the action of *Dunlop* v. *Haney* in Vancouver, judgment was reserved by MARTIN, J., who then went to Victoria, subsequently reduced his judgment to

writing and signed it on the 11th August, 1899, and enclosed it in an envelope with a covering letter directed to the District Registrar at Vancouver. The letter should have reached the District Registrar early the next morning according to the regular course of the mails, but the office receipt stamp of the Vancouver registry stamped on the judgment bore date the 15th August, 1899.

For the determination of the present action it became necessary to decide when the judgment in *Dunlop* v. *Haney* was pronounced.

Held, that judgment was pronounced on the 11th August, 1899, when the matter was finally determined so far as the Judge was concerned; and that the parties to the action could not be prejudiced by any delay in the Registry or the post office.

IN CHAMBERS.

[IRVING, J., 11TH SEPTEMBER, 1900.

McCLARY v. HOWLAND.

Security for costs—Joint plaintiffs—Extra-provincial company—R. S. B. C. c. 44, s. 144.

Summons for security for costs. The McClary Manufacturing Company were an extra-provincial company having valuable assets in the Province, and the plaintiff Drake was resident within the Province.

Held, that an extra-provincial company must give security for costs under R. S. B. C. 1897 c. 44, s. 144, notwithstanding it is suing along with a resident of the Province and has assets within the Province.

Security ordered in the sum of $200.

Kappele, for the summons.

Bloomfield, contra.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [29TH JUNE, 1900.

FERGUSON v. GALT PUBLIC SCHOOL BOARD.

Master and servant—Negligence—Common employment—Workmen's Compensation for Injuries Act—Superintendence—Defect in ways.

The plaintiff was a labourer employed by the defendants to carry mortar to masons, also employed by them, who were building a wall on the defendants' land. The work was being done under the superintendence of a foreman, who, after the wall had been built, directed the plaintiff and one mason to do the tuck-pointing next day. In order to enable the plaintiff to take the mortar to the mason at the foot of the outer face of the wall, the mason and the plaintiff made a gangway, of planks which had been used in the scaffolding, from the top of the wall to an adjacent building and thence to the ground, and, while the plaintiff was walking on the gangway with a load of mortar, an insecurely fastened plank gave way and he was injured.

Held, that the defendants were not liable at common law, the mason and the plaintiff being fellow workmen exercising their own judgment as to the proper means of accomplishing their object, and the planks being strong and sufficient for the purpose required if properly fastened.

Held, also, that there was no liability under the Workmen's Compensation for Injuries Act, the mason not being a person to whose orders the plaintiff, in respect of the mode of carrying the mortar, was bound to conform, and the gangway not being a "way" within the meaning of the Act,

or constructed by a person having, in regard to it, superintendence intrusted to him.

Judgment below reversed.

Lount, Q.C., and *W. D. Card*, for the appellants.

Monro Grier, for the respondent.

ARMOUR, C.J.]

STROUD v. WILEY.

Partnership—Purchase of partner's interest by co-partners—Errors in statements—Fraud.

In order to avoid a dissolution of partnership and a winding-up of the business, the interest of a partner in the partnership assets was purchased by his co-partners for an amount equal to the profits standing at his credit, his salary to the time of the purchase, and a percentage of his capital as shown in the last yearly balance sheet, which was based upon statements prepared under the supervision of this partner. More than two months after the transaction the plaintiffs brought this action, alleging that part of the stock-in-trade had been overvalued in the statements, and claiming repayment of part of the purchase money.

Held, upon the evidence, that the purchase price was arrived at as a compromise, and not as an arbitrary proportion of definite items, but that, apart from this, as the statements had been prepared in good faith and in accordance with the uniform usage of the business, the defendant was not liable.

Judgment below reversed.

Aylesworth, Q.C., and *L. F. Stephens*, for the appellant.

Robinson, Q.C., and *Charles Miller*, for the respondents.

ROBERTSON, J.] [22ND SEPTEMBER, 1900.

BOGARDUS v. WELLINGTON.

Limitation of actions—Sale of goods—Warranty—Fraud.

The defendant, who was a nurseryman, sold to the plaintiff a number of peach trees, giving a warranty that they were "No. 1 peaches, warranted true to name."

Held, that this was a warranty that the trees were of the varieties contracted for, not that the fruit would be of those varieties; that, the trees not being of the varieties contracted for, the warranty was broken at the time of the sale; and that, in the absence of fraud, an action for damages for its breach brought more than six years after the sale was barred, although until the trees came into bearing shortly before the action it was impossible to tell that they were not of the varieties contracted for.

Judgment below reversed.

Ritchie, Q.C., and *Ryckman*, for the appellant.

Lynch-Staunton, Q.C., and *J. H. Ingersoll*, for the respondent.

DRAINAGE REFEREE.] [19TH SEPTEMBER, 1900.

McKIM v. TOWNSHIP OF EAST LUTHER.

Local Masters—Jurisdiction—Referring actions to Drainage Referee.

A local Master of the High Court has jurisdiction by virtue of Rules 42 and 49—see also Rule 6 (*a*)—to make an order, under s. 94 of the Municipal Drainage Act, R. S. O. c. 226, referring an action brought in his county to the Referee under the Drainage Laws.

Mabee, Q.C., for the appellants.

M. Wilson, Q.C., for the respondent.

IN CHAMBERS.

[OSLER, J. A., 28TH SEPTEMBER, 1900.

In re REDDOCK AND CITY OF TORONTO.

Appeal—Leave—Judicature Act, s. 77.

Where a motion to quash a municipal by-law was refused by the Judge who heard it, and his order affirmed by a Divisional Court, an application for leave for a further appeal was dismissed.

Held, that, under s. 77 of the Judicature Act, upon such an application for leave, it must appear that there is some reasonable ground for doubting the soundness of the judgment, and in addition thereto that special reasons exist for taking a case out of the general rule which forbids more than one appeal to the same party.

F. E. Hodgins, for the applicant.

Fullerton, Q.C., for the city corporation.

HIGH COURT OF JUSTICE.

[FALCONBRIDGE, C.J., STREET, J., 29TH SEPTEMBER, 1900.

SUPREME COURT OF THE INDEPENDENT ORDER OF FORESTERS v. PEGG.

Mortgage—Foreclosure—Mortgagee in possession—Account of rents—New day—Final order—Rights of purchaser after decree—Parties—Power of sale.

Mortgagees had been in possession of several of the parcels of land comprised in their mortgage before they commenced an action for foreclosure. In that action the usual judgment was pronounced, and while the reference thereunder was pending the plaintiffs agreed to sell some of the parcels to B. in case the mortgagors should not redeem; and B. went into possession. The Master made his report on the 13th February, 1900, fixing the 14th August, 1900, as the day for redemption, and ascertaining the amount due by the defendants up to that day. On the 15th May an order was made amending the report by deducting amounts received by the plaintiffs for rent, and directing that any other rents received up to that time should be credited on the final adjustment. On the 15th August the defendants applied for a new day, when the plaintiffs stated on affidavit that sums paid by them for taxes and costs more than exhausted the rents received since the date of the report. No other statement was made by the plaintiffs. The application was refused, and on the 17th August a final order of foreclosure was granted.

Held, that the statement of the plaintiffs was insufficient; the mortgagor, before a final order of foreclosure is made, is entitled to know how much he must pay in order that he may redeem, and the modes in which that amount may be ascertained, where it has been changed after report, are pointed out in Rule 387.

Held, also, that a purchaser who has purchased during the pendency of foreclosure proceedings, and whose rights are expressly subject to the termination of the proceedings by a final order of the Court in favour of the mortgagee, stands in a different position from one who comes in for the first time after a final order has been made, and is much more readily made subject to the discretion of the Court to open the foreclosure.

Campbell v. *Holyland*, 7 Ch. D. 166, and *Johnston* v. *Johnston*, 9 P. R. 259, followed.

Gunn v. *Doble*, 15 Gr. 655, distinguished.

In this case the mortgagors were in no default, the slightest examination of the proceedings on the part of the purchaser would have shewn him that the mortgages had never been properly foreclosed, and that no day had ever been fixed for the payment of the balance due the mortgagees. But he did not even ask whether a final order had been obtained, which was the condition upon which his sale was to be carried out.

Held, therefore, that the mortgagors had clear rights to redeem; and, having come in promptly for relief and taken vigorous steps to assert their rights, they were entitled to have the final order of foreclosure set aside, a new account taken and a new day fixed, and to redeem both as against the plaintiffs and B., for which purpose the latter should be added as a party.

Held, lastly, that the sale to B. was not, under the circumstances, sustainable under the power of sale contained in the plaintiffs' mortgage.

Kelly v. *Imperial Loan Co.*, 11 S. C. R. 516, distinguished.

J. Bicknell, for the plaintiffs.

W. H. Blake and *S. B. Woods*, for the defendants.

Aylesworth, Q.C., for the purchaser.

[BOYD, C., FERGUSON, J., MEREDITH, J., 8TH OCTOBER, 1900.

FORSTER v. IVEY.

Mortgage—Covenant of mortgagor—Enforcement—Dealings between mortgagee and assignee of equity.

The relations which exist among mortgagee, mortgagor, and assignee of the land who has agreed to pay the mortgage, are not those which obtain among creditor, surety, and principal debtor.

Aldous v. *Hicks*, 21 O. R. 95, approved.

Nor should the doctrine of discharge applicable to the case of an ordinary surety be extended to the case of a mortgagor where no actual prejudice has arisen.

So long as the covenant to pay endures, the mortgagor is liable to pay when sued by the mortgagee; his equitable right is, upon payment, to get the land back, or to have unimpaired remedies against his assignee if he has sold the land; and if those rights can be exercised by him at the time he is sued, it is immaterial that at some previous time there was such dealing between his assignee and the mortgagee as would then have interfered with such rights.

Mathers v. *Helliwell*, 10 Gr. 173, explained.

Dictum of MACLENNAN, J.A., in *Trust and Loan Co.* v. *McKenzie*, 23 A. R. 167, dissented from.

Barber v. *McCuaig*, 24 A. R. 492, 29 S. C. R. 126, followed.

D. W. Saunders and *Cattanach*, for the plaintiff.

Hellmuth, for the defendant Ivey.

HILL v. INGERSOLL AND PORT BURWELL GRAVEL ROAD CO.

Contract—Road company—Implied covenant—Corporate seal.

An agreement in writing signed by the plaintiff and by the superintendent of the defendants' road, but not under seal, and not purporting to be made by the defendants, who were an incorporated road company, was in part as follows.—"I" —the plaintiff—"have this day agreed with" the defendants "to furnish good gravel and deliver the same on the centre of the road bed . . . and the company agree to pay me at the rate of $2.40 per cord . . . And it is further agreed that my tolls . . . shall be free during the full term of this agreement. And it is further agreed that in consideration of this agreement and for the sum of $1 . . I do . . . discharge all claims I hold against the company. . . . And it is further agreed that this agreement for gravel to hold good as long as the company keep the road and as long as my gravel holds good. . . ."

Held, that an agreement on the part of the defendants that they would take from the plaintiff all the gravel they should require for the portion of their road referred to in the writing, as long as he was able and willing to supply it, was not to be implied from the terms of the writing; and the taking of gravel from another person was not a breach of the agreement.

Held, also, per FERGUSON, J., that to bind the corporation by an executory contract to purchase from the plaintiff all the gravel required for a portion of their road for an indefinite and protracted period, would require an agreement under their corporate seal.

Judgment of ARMOUR, C.J., affirmed.

F. A. Anglin, for the plaintiff.

Riddell, Q.C., and *V. Sinclair*, for the defendants.

[MEREDITH, C.J., 20TH JUNE, 1900.

ONTARIO BANK v. ROUTHIER.

Banks and banking—Deposit—Decease of depositor—Liability on promissory note—Right of bank to deduct.

A testator, having a deposit to his credit in a bank at the time of his death, was a debtor to the bank on a note under discount, which had not then matured. After its maturity the bank brought this action on the note against his executors. The assets of the testator were insufficient to pay his debts in full. The deposit not having been withdrawn or demanded before the maturity of the note:—

Held, that the bank was entitled to deduct from the amount of the promissory note the amount at the credit of the deceased, and to rank on the estate for and receive a dividend on the balance.

Wyld and *Glyn Osler*, for the plaintiffs.

Belcourt, Q.C., and *J. A. Ritchie*, for the defendants.

[MEREDITH, J., 28TH SEPTEMBER, 1900.

MACDONALD v. MAIL PRINTING CO.

Trial—Nonsuit after verdict—Libel—Innuendo—Onus—Evidence for jury—Newspaper—Report of speech—"Blackmailing," meaning of—Truth of defamatory words.

Where in the course of the trial of an action before a Judge and jury a motion for a nonsuit is made at the close of the plaintiff's case, and again at the close of the whole evidence, and the Judge adopts the course of taking a verdict, and of fully hearing and considering the motion, if necessary, after the verdict, the Judge may, in a proper case, nonsuit the plaintiff, notwithstanding a verdict of the jury in his favour.

Perkins v. *Dangerfield*, 51 L. T. N. S. 353, and *Moore* v. *Connecticut Mutual Ins. Co.*, 6 App. Cas. 644, distinguished.

Floer v. *Michigan Central R. W. Co.*, 27 A. R. at p. 127, referred to.

In an action for libel the words complained of were: "It can be readily understood what interest Mr. M. has in the matter, and why he should make advances, hire committee rooms, and generally control the campaign, when $4,000,000, which he controls, will be made available if E. A. Macdonald (the plaintiff) can be elected mayor. In addition to this Mr. M. has between $7,000 and $10,000 of claims against Macdonald, which in proceedings it was shewn under oath of Mr. M. that he hoped to be paid, should he succeed in qualifying Macdonald for mayor, and then electing him."

The innuendo was that the defendants charged the plaintiff with having "entered into a corrupt arrangement" with one M. "whereby the plaintiff should use the office of mayor, when elected, for private gain," and with having "unlawfully and corruptly influenced or attempted to influence the said M. to support him in the mayoralty campaign, both financially and otherwise," and with being "unlawfully and corruptly influenced" by said M. "to use the said office of mayor to improperly advance the pecuniary and private undertakings of the said M."

Held, that, there being no evidence, apart from the newspaper article in which they appeared, to shew that the words bore any other than their ordinary meaning, the onus of proof of the innuendo was not satisfied; there was no reasonable evidence to go to the jury that the words conveyed the meaning which the plaintiff attributed to them.

The plaintiff also complained of a statement published by the defendants that a speaker at a public meeting "characterized" the plaintiff's behaviour as "blackmailing." The defendants pleaded the truth of the words used.

Held, that it made no difference that the defendants were only reporting, or purporting to report, the words of another, or whether the report was accurate or inaccurate—that question arises on a defence of fair and accurate report only. If the words were true, the plaintiff could not recover.

The word "blackmailing" should not at the present day and in this country be limited in its meaning to the case of the crime of extortion by threats or any other crime.

Where a man, having no right, nor any pretence of right, to receive one farthing (except his proper law costs, if he succeed in the action) receives $4,500 to hush a complaint of, and to stifle his legal proceedings to prevent, a wrong which he charges is about to be perpetrated by means of audacious bribery of public officers, his conduct may be "characterized as blackmailing" in the proper and ordinary meaning of these words.

There being no evidence of the falsity of the words used, but they appearing, upon uncontroverted evidence, to be true, the plaintiff's case failed.

Semble, also, that the innuendoes that the plaintiff "had committeed a crime punishable by law," that he was "unworthy of any position of trust," and that he "was a blackmailer," could not be supported.

Quaere, whether the plaintiff, having chosen to put his own interpretation upon the words, and to bring the defendants down to trial upon that interpretation, and to try the case out accordingly, could be permitted subsequently to reject the innuendos and rely upon the words (if untrue) having another libellous meaning, whether libellous in themselves or not.

The respective functions of Judge and jury are, in an action of libel, in no way different from such functions in other actions, except for the statutory provision in favour of a defendant, R. S. O. c. 68, s. 2.

It is the duty of the Court to consider whether there is any reasonable evidence to go to the jury, and, if not, to dismiss the action.

E. F. B. Johnston, Q.C., and *Bradford*. for the plaintiff.

J. B. Clark, Q.C., and *Swabey*, for the defendants.

NOVA SCOTIA.

In the Supreme Court.

[FULL COURT, 8TH APRIL, 1899.

PIPER v. KING'S DYSPEPSIA CURE CO.

Costs—Setting aside regular judgment by default—Terms—Appeal.

Action brought in a County Court. Judgment for the plaintiff was entered regularly for default of defence. The defendants moved to be let in to defend. SAVARY, C. C. J., allowed the application. The plaintiff appealed, upon the ground that the defendants' affidavit was insufficient. The appeal was allowed, and the defendants permitted to file a further affidavit: see 30 N. S. Reps. 429. The defendants again applied before SAVARY, C. C. J., with a fresh affidavit, to be let in to defend. The plaintiff read affidavits in answer, and asked leave to cross-examine the defendants' deponent on his affidavit in support of the application. Refused. SAVARY, C. C. J., allowed this second application of the defendants, and, because the plaintiff had unreasonably and oppressively opposed the application, and because the defendants had to pay the costs of the first appeal, ordered that the plaintiff pay the defendants the costs of the second application before him.

On appeal it was ordered that the judgment be opened up on the terms that the defendants pay the plaintiff's costs thrown away in opening up the judgment and their own costs of the application to open up the judgment.

Appeal allowed with costs.

F. L. Milner, for the plaintiff.

George Patterson, for the defendants.

[14TH APRIL, 1900.

KENDALL v. BENSON.

Costs—Discretion of Court in relation to—County Court—Appeal.

Action brought in a County Court to recover $155.98 due upon a promissory note. Defence, as to $122, payment and set-off; but no defence was set up to the residue of the demand. Tried before SAVARY, C. C. J., who found in the defendant's favour on the question of payment and set-off, but refused the defendant the costs of suit, because the balance of $33.98, which the defendant did not deny was due to the plaintiff, had not been paid into Court or to the plaintiff.

On appeal, the defendant was allowed his costs of suit in the County Court.

O. S. Miller, for the plaintiff.

F. L. Milner, for the defendant.

IN CHAMBERS.

[RITCHIE, J., 15TH SEPTEMBER, 1900.

ROBERT v. MILLER (No. 1.)

Particulars—Mortgage—Payments—Consideration—Proof of agency.

Application by the plaintiff for particulars of the defence. The action was to set aside a deed and for a declaration that two certain mortgages had been paid, or in the alternative for redemption. The defendants pleaded that the plaintiff, being bed-ridden for a number of years, had appointed one of the defendants his agent to transact business for him; that the consideration of one mortgage was money lent by the defendant Miller to the plaintiff; that the defendant Miller was assignee of the other mortgage; that he had given full consideration therefor to the mortgagee; and that he had also paid to the plaintiff the full consideration for the deed sought to be set aside. The plaintiff, on affidavit, denied knowledge of payments and consideration alleged.

Held, that the defendants should give particulars shewing whether the alleged authorization to the agent was in writing, and the date; also dates and items of money alleged to have been lent to the plaintiff, dates and items of payments for mortgage of which the defendant Miller was assignee; and how, when, and in what manner the consideration for the deed mentioned in the statement of claim was paid.

W. F. O'Connor, for the plaintiff.

Harrington, Q.C., *A. McGillivray*, and *M. U. Lenoir*, for the defendants.

[18TH SEPTEMBER, 1900.

MESSENGER v. TOWN OF BRIDGETOWN.

Appeal bond—Supreme Court of Canada—Surety—Wife.

One of the sureties of the plaintiff's bond filed as security for the costs of an appeal to the Supreme Court of Canada was the wife of the plaintiff.

Held, that the bond was insufficient on that account, but that the time should be extended to enable the plaintiff to file another bond.

O. S. Miller, for the plaintiff.

Ruggles, Q.C., for the defendants.

[21ST SEPTEMBER, 1900.

McLAUGHLIN CARRIAGE CO. v. OLAND.

Particulars—Order for—Dies non juridicus—Enforcement pending appeal.

Application by the plaintiffs to strike out certain paragraphs of the defence for non-delivery of particulars pursuant to an order of a Judge in Chambers. The defendant had, prior to receiving notice of this motion, given notice of appeal from the order for particulars.

It was contended by the defendant that the order for particulars was bad, having been made on Dominion Day, and that it ought not to be enforced while an appeal against it was pending.

Held, that neither objection could prevail in these proceedings. An appeal is not a stay, and an order is good until reversed.

It was ordered that the defendant should deliver the particulars within twenty days, so as to have them before the trial of the action, and, in default of delivery, that the paragraphs of the defence of which particulars had been ordered should be stricken out with costs.

Davey v. *Bentinck*, [1893] 1 Q. B. 185, followed.

W. F. O'Connor, for the plaintiffs.

Harrington, Q.C., for the defendant.

ROBERT v. MILLER (No. 2).

Discovery—Production of documents—Pleading—Documents mentioned in—Affidavit.

Application by the plaintiff for an order to enforce production of documents to which reference had been made in the defendants' pleading: Order XXX., Rules 15, 17, 18.

The defendants had referred to a certain deed which contained a reservation, both in the grant and habendum, as follows: "Subject, however, to the terms of a written agreement entered into between the said parties this day." The defendants objected to produce this agreement, upon the ground that it was not a document referred to in the pleadings. The plaintiff's affidavit did not allege that the document was in the possession or power of the defendants. For the plaintiff it was contended that, if the document was to be regarded as one referred to in the pleadings, no affidavit was necessary: Order XXX., Rule 18.

Held, that the agreement was not a document referred to in the pleadings; that the affidavit was defective; and the motion should be refused with costs.

W. F. O'Connor, for the plaintiff.

Harrington, Q.C., for the defendants.

[25TH SEPTEMBER, 1900.

ROBERT v. MILLER (No. 8).

Counterclaim—Mortgage action—Redemption—Foreclosure.

Application by the plaintiff to strike out the defendant Miller's counterclaim. The action was to set aside certain deeds, and for a declaration that certain mortgages were paid off, or for redemption. The defence denied all the material allegations of the statement of claim, and the counterclaim was for foreclosure in respect of the mortgages mentioned. The objection was that the counterclaim was unnecessary and embarrassing, and that the defendant Miller, being a mortgagee in possession, should have stated his willingness to account.

Daniel McNeil,, for the plaintiff.

Harrington, Q.C., for the defendant Miller.

RITCHIE, J.—I am inclined to think that it is not absolutely necessary for the defendant Miller to counterclaim for foreclosure in respect of the mortgages which the plaintiff contends are paid off and should be released, for the general principle is, that when the plaintiff fails in an action for the redemption of a mortgage the defendant is entitled to have a decree of foreclosure. But it must be remembered that the plaintiff's claim covers other matters also, and that his claim for redemption is only in the alternative. If the plaintff should partly succeed in his suit and abandon his alternative claim, it is possible that the defendant might have a good deal of difficulty in getting an order for foreclosure without another action, and I do not think he should be compelled to take this risk. I cannot see that the counterclaim is embarrassing to the plaintiff. It raises the same issues as are raised by the plaintiff in his statement of claim, and any decision that decides all the points in the plaintiff's statement of claim decides the counterclaim.

The motion will be refused with costs.

[See *Girardot* v. *Welton*, 20 Occ. N. 231, 257, 19 P. R. 162.]

BALCOM v. CROFT.

Venue—Motion to change—Time for.

Application by the defendant to change the place of trial from Bridgewater to Liverpool. A defence had been put in, but the time for replying had not elapsed. The plaintiff's solicitor made affidavit that he intended specifically to reply.

Wade, Q.C., for the defendant.

McLean, Q.C., for the plaintiff.

RITCHIE, J.—On the authority of *Kidd* v. *Henderson*, 20 N. S. Reps. 441, I think the application is premature. The judgment of the Court there was that an application such as this should not in general be made until after issue joined or until it could clearly be seen what the issues would be.

The counsel for the defendants seemed to think that I should be able clearly to see what the issues would be by my reading of the claim and defence, but I confess my inability to do so. The defence raises many different questions, but, until the replication is in, I cannot say whether or not the defendant will be obliged to sustain the whole of them by evidence.

The motion will be refused with costs, but with leave to move again after the cause is at issue.

MACKINTOSH v. MACCOY.

Pleading—Striking out defence—Falsity.

Application by the plaintiff to strike out a defence as false. The action was upon a promissory note. The paragraphs attacked were allegations of no presentment, no notice of dishonour, and of payment. The plaintiff's affidavit verified his claim. Affidavits filed by the defendants stated that the note was paid, but did not go far enough to prove non-presentment and lack of notice of dishonour.

Held, that the allegations of want of notice and non-presentment must be stricken out, but, as to payment, there was matter for trial, and this paragraph must stand.

J. M. Davison, for the plaintiff.

W. H. Fulton, for the defendants.

FORBES v. PEARSON.

Particulars—Agreement, written or parol— Date—Partnership dealings.

This was an application by the defendant for further and better particulars of the statement of claim, which alleged a partnership and a dissolution, and claimed an account of the property and money of the co-partnership which had come into the hands or under the control of the defendant, under certain circumstances set out in the statement of claim.

The defendant asked for particulars shewing (1) whether or not the alleged partnership agreement was in writing, and the date and the terms thereof other than those set out in the statement of claim; (2) the transactions in respect of which the plaintiff alleged that the defendant became possessed of partnership funds.

Harris, Q.C., for the defendant.

F. J. Congdon, for the plaintiff.

RITCHIE, J.—I think the defendant is entitled to know whether the alleged partnership agreement was in writing, and the date, but, as the terms set out in the statement of claim alone constitute the plaintiff's claim, any other terms are not particulars of such claim, and the defendant cannot obtain them in this way if he wishes to make them available for a defence.

In my opinion, he cannot get the other particulars asked for, at this stage. They are not necessary to enable him to put in his defence. The first question to be decided is whether there has been a partnership which has been dissolved, and the next, the terms of it. If the partnership

and the dissolution are admitted or proved, an order for accounting follows as a matter of course, and these matters will come up before the Master, with whom both parties must file an account of their transactions with the partnership assets.

The case of *Augustinus* v. *Nerinckx*, 16 Ch. D. 13, seems to me directly in point, and I never heard of a case in equity for the settlement of a co-partnership where the plaintiff was compelled to give the particulars of his claim against the co-partner in the first instance. No costs to either party.

[TOWNSHEND, J., 22ND MAY, 1897.

RICE v. STEWART.

Judgment by default—Undertaking to appear—Failure to appear—Setting aside—Costs.

An application by the defendant to set aside an interlocutory judgment by default, on the ground of irregularity, the defendant also shewing a defence on the merits. The plaintiff did not object to an order being made allowing the defendant in to defend upon the usual terms, but contended that there was no irregularity.

The defendant's solicitor accepted service of process and undertook to enter an appearance, which he failed through inadvertence to do, and afterwards advised the plaintiff's solicitor, and requested him to have the judgment set aside by consent, and allow the defendant to defend. The plaintiff's solicitor consented on terms of the defendant paying costs.

H. Mellish, for the defendant, contended that, when a solicitor accepts service and undertakes to appear and does not, the only course is to proceed against him by attachment, but that nothing short of personal service will justify entering judgment.

F. L. Milner, for the plaintiff.

TOWNSHEND, J.—Under the Rules no doubt the defendant's contention is right. I have no doubt in this case it was purely forgetfulness on the part of the defendant's solicitor, with no intention of taking any advantage of his undertaking, and that he was acting in good faith. I think, also, it would have been more regular to have first written the defendant's solicitor, calling for the appearance before entering judgment, although I do not say it was absolutely necessary. The order will be to set aside the judgment, with leave to appear and defend, but the costs of this application will be costs in the cause.

[MEAGHER, J., 26TH OCTOBER, 1899.

FORSYTH v. SHIPLEY.

Statute—Imperative or directory—Transfer of cause to Supreme Court—Jury trial—Security for costs.

The plaintiff, the holder of a promissory note made by the defendant, gave notice demanding payment on or before a certain date. The defendant, asserting a claim against the plaintiff for 95 cents, on the date mentioned for payment sent the amount due on the note less 95 cents, together with a receipted bill for that amount, to the plaintiff, who accepted the same and promised to send the note to the defendant shortly. Later on the same day the plaintiff went to the defendant's store and returned the money and receipted bill, saying she was advised by her solicitor that the money must go through his hands, and that the bill must be rendered against her deceased husband's estate. The defendant subsequently on the same day tendered the plaintiff the whole amount of money due her on the note. She refused to accept it, and the next day brought action in the County Court on the note. The defendant pleaded tender and paid the money into Court. The plaintiff denied the tender in her reply, and gave notice of trial. The defendant then gave notice for a jury in the County Court, and a few days later applied to a Judge in Chambers in the Supreme Court for an order under c. 39 of the Acts of 1899 for an order to transfer the cause into the Supreme Court to be tried with a jury.

In the affidavits used in support of the application the tender was clearly proved, and was not denied in any way by the plaintiff's affidavits.

The action would have been tried in the County Court within ten days, but in the Supreme Court not for six months.

F. L. Milner, for the defendant.

Ruggles, Q.C., for the plaintiff.

MEAGHER, J.—This is a motion under c. 39 of the Acts of 1899 to transfer this cause from the County Court into the Supreme Court for trial.

It appears that the only question to be tried is whether a tender in due form was made before action, and therefore it involves a mere question of costs, the liability being admitted.

Three objections were urged against it, namely, (1) that there was nothing for a jury to try, at all events nothing which could not be tried equally well in the County Court, (2) delay in making the application and the delay which would arise if the motion succeeded, and (3) that notice requiring trial by jury was given in the County Court.

The answer to these was that the statute was peremptory, and its requirements were complied with.

There is something for a jury to try, but nothing which could not be tried equally well by a jury in the Court below as in this Court.

If the matter rested in my discretion, or if I felt myself at liberty to regard the affidavits in reply upon the point of a defence upon the merits, I should certainly refuse it.

I do not regard the delay in making the application as very material, because the plaintiff recently amended her pleadings. If, however, further delay is regarded, the motion, if granted, will work a continuance of the cause until June next, while otherwise it can be tried in the County Court with a jury at a very early day, and if an appeal should be taken from the conclusion reached it could be heard and determined before, in ordinary course, the trial can take

place in this Court. These conclusions, apart from the question arising upon the effect of the statute, would, in my opinion, afford a conclusive answer to the application. Moreover, the concluding words of s. 2, it may well be said, make the mere lapse of time, whether past or prospective, immaterial. The giving of the notice demanding a trial by jury in the County Court has no bearing so far as I can perceive. I do not suppose that the object of the statute was merely to enable a trial of the issues by a jury in this Court.

The statute, omitting words not material to the present inquiry, enacts that if a defendant by affidavit shows to the satisfaction of this Court or a Judge thereof that he has a good defence on the merits, and further alleges therein that he desires the cause to be tried with a jury in the Supreme Court, and that he believes the same can be so tried more satisfactorily, the Supreme Court or a Judge thereof shall, on such terms as to security for costs as shall be thought fit, order the cause to be transferred.

The rule for construing a statute of this character appears to be that "whenever authority to do a judicial act in a certain case is conferred, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having a right to make the application, and the exercise depends not on the discretion of the Court or Judge but upon proof of the particular case out of which the power arises."

The defendant has in his affidavit satisfied the terms of the statute, and if what I am called upon to do involves the doing of a judicial act—then under the terms of the above rule I have no discretion whatever and must yield obedience to the statute.

The statute is silent as to the costs of this application; no reference was made to them; and I shall therefore reserve them.

I cannot help feeling that if the delay which must arise in this case had been present to the mind of the Legislature when considering this enactment as a possible consequence of the statute, it would have been expressed in different

terms, and some discretion would be vested in the Court or Judge empowered to determine applications under it.

I cannot conceive of a case in the County Court under the law as it now stands which upon application under the statute must not be transferred to this Court and tried there by a jury whether there is a question in it proper to be tried by a jury or not.

Even a suit for the collection of an alleged debt of fifty cents which originated in a magistrate's Court may, nay, it appears to me, must, upon application in due form, be transferred into this Court, and be tried by a jury. The statute is so generous towards the applicant that it does not even require him to show that there is a question in the cause suitable for trial by jury, or that it is necessary it should be tried by a jury. All that he is required to say is that he desires a trial with a jury in the Supreme Court, and that he believes it can be more satisfactorily tried there.

The statute having intrusted me with a discretion on the subject of security for costs, I shall exercise it by ordering the defendant to deposit $80 in cash in Court as security for costs. Upon that being done an order will be made transferring the cause.

[HENRY, J., 7TH NOVEMBER, 1899.

WILLIAMS v. MORSE.

Mortgage—Foreclosure—Pleading—Defence.

To an action brought by a first mortgagee for foreclosure, the defendants, purchasers of the equity of redemption, pleaded that after the making of the plaintiff's mortgage, the mortgagor made a second mortgage of the same lands, which was still outstanding and unpaid. The plaintiff applied to strike out the defence, under Order XXV., Rule 4.

Ordered that the defence should be struck out.

F. L. Milner, for the plaintiff.

Ruggles, Q. C., for the defendants.

WILLIAMS v. BROWN.

Parties—Administrator—Mortgage action.

Subsequently to the making of a mortgage the original mortgagor had assigned the equity of redemption in the mortgaged premises to F. in trust to pay the creditors of the mortgagor, who had become insolvent. In an action by the mortgagee for foreclosure the administrator of the estate of F. was made the defendant. Section 19 of the Trustee Act, as amended in 1889, reads: "Where an estate or interest of inheritance . . . . is vested on any trust . . . in any person solely, the same shall on his death, notwithstanding any testamentary disposition by such person, devolve to and become vested in his personal representatives in like manner as if the same were a chattel real vesting in them . . ."

Held, that the administrator was the proper party defendant.

F. L. Milner, for the plaintiff.

Ruggles, Q.C., for the defendant.

MANITOBA.

In the Queen's Bench.

[KILLAM, C.J., 9TH OCTOBER, 1900.

ROGERS v. CLARK.

Pleading—Malicious prosecution—Statement of defence—Motion to strike out—Embarrassment—Ambiguity.

Application to strike out certain paragraphs of a statement of defence as tending to prejudice and embarrass the fair trial of the action.

The statement of claim embodied two charges of malicious prosecution.

The statement of defence denied generally the allegations in certain specified paragraphs of the statement of claim,

being those containing all the material allegations. It also set up generally that the defendant had reasonable cause for taking against the plaintiff the first proceeding complained of, and that the defendant acted *bona fide* and in the reasonable belief of the truth of the charges laid by him. It alleged that the defendant had reasonable and probable cause for believing that the plaintiff was guilty.

The paragraphs sought to be struck out set up certain alleged facts and information given to the defendant tending to cause his belief of the plaintiff's guilt, and, also, that the defendant laid all the information received by him before the magistrate before whom the charges were made, and before counsel, who advised that the proceedings complained of should be taken.

The principal objections taken were that these facts and information and the advice of counsel and magistrate were merely evidence of reasonable and probable cause which should not have been set out in detail; and that sufficient was not stated to show absolutely reasonable and probable cause, as the information and inquiry might not have been sufficient to warrant belief of guilt.

Held, that an order should go striking out the paragraphs objected to; costs to be costs in the cause to the plaintiff. The defendant to have leave to amend.

The statement of defence alleged that the defendant received certain information without showing the source or that it was reliable. The 8th paragraph was ambiguous in not showing whether it was both the magistrate and counsel who advised the proceedings or one of them, It did not appear what facts were laid before them. All of this seemed of little value as indicating to the plaintiff what he had to meet.

If a defendant sets up facts and ties himself carefully down to those as constituting his sole ground for the proceedings complained of, that course might be of service to a plaintiff. But where, as in this case, he left it open to himself to prove other and entirely distinct facts for the purposes of his defence, the allegations made would seem to be

but a snare which might mislead the plaintiff into assuming those to be all that he had to meet.

Metcalfe, for the plaintiff.

C. H. Campbell, Q.C., for the defendant.

ROBOCK v. PETERS.

Costs—Mechanics' liens—"Actual disbursements"—Counsel fees.

Subsequent to the decision in this case, *ante* 262, 13 Man. L. R. 124, the question as to whether counsel fees were to be included among "actual disbursements" under s. 37 of the Mechanics' and Wage-Earners' Lien Act, 1898, was argued before KILLAM, C.J., who decided that, where such fees were shown to have been actually paid, they were to be treated as "actual disbursements," whether the counsel should be a solicitor or partner of a solicitor in the cause or another barrister.

Magurn v. *Magurn*, 10 P. R. 570, referred to.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 10TH SEPTEMBER, 1900.

KING v. BOULTBEE.

Attachment of debts—Money paid into Court by garnishee—Setting aside attachment—Order retaining money in Court—Nullity.

Appeal from an order of FORIN, Co.J. The action was begun in the County Court of Rossland on the 28th October, 1899, to recover $171, and a garnishee summons was also issued and served on the garnishee, who, on the 30th October, paid into Court $173.70. On the 17th November an order was made setting aside all the proceedings, but ordering that the moneys in Court remain to abide the result of an action to be commenced forthwith in respect of the same cause of action. The order also provided that the question as to

whether the moneys were attachable should be determined as of the date of the issue of the garnishee summons so set aside. The new action was commenced on the 18th November.

On the 21st November the defendant assigned the moneys then in Court, and on the 14th February, 1900, a summons was taken out in the first action on behalf of the defendant and the assignee for the payment out of Court of the moneys to the assignee. This summons was discharged, and the defendant and the assignee appealed. The order of the 17th November was not appealed against.

Held, per McColl, C.J., and Walkem, J., dismissing the appeal, that the order of the 17th November was not a nullity, and, as it was not appealed against, it was valid; Irving and Martin, JJ., dissenting.

Duff, for the appellants.

MacNeill, Q.C., for the respondent.

[Martin, J., 15th August, 1900.

ATTORNEY-GENERAL v. DUNLOP.

Mines and minerals—Certificate of improvements—Fraud—Application of Minister of Mines—Writing—Necessity for.

In an action by the Attorney-General to set aside a certificate of improvements, on the ground that it was obtained by fraud, the fraud alleged was a statement in an affidavit of the defendant's agent, sworn on the 10th August, 1899, that the defendant was in undisputed possession of the "Pack Train" mineral claim. On the 10th August, 1899, an action was then pending as to the title of the "Pack Train" claim, and judgment was not delivered till the 11th August, 1899, in favour of the defendant. It was after the 11th August when the affidavit reached the Gold Commissioner.

Held, not fraud within s. 37 of the Mineral Act.

The application of the Minister of Mines under s. 10 of the Mineral Act Amendment Act, 1899, need not be in writing.

Cassidy, for the plaintiff.

Duff, for the defendant.

Exchequer Court of Canada.

[BURBIDGE, J., 7TH JUNE, 1900

BRIGHAM v. THE QUEEN.

Ferry—Breach of grant —Subsequent lease to railway companies—Damages —Liability of Crown.

The Crown, having granted to the suppliant certain ferry rights over the Ottawa river between the cities of Ottawa and Hull, subsequently leased certain property to two railway companies to be used for the construction of a bridge across the river between the cities, and also gave permission or license to the Ottawa Electric Railway Company to extend its track over certain property belonging to the Dominion Government on the Hull side of the river, to enable the latter to make closer connection with the Hull Electric Company. The suppliant claimed that such leases and license enabled the companies to divert traffic from his ferry, and constituted a breach of his ferry grant, for which the Crown was liable.

Held, that the granting of the leases and license did not constitute a breach of any contract arising out of the grant of the ferry; and that the Crown was not liable to the suppliant in damages in respect of the matters complained of in his petition.

Windsor and Annapolis R. W. Co. v. *The Queen*, 10 S. C. R. 335, 11 App. Cas. 607, and *Hopkins* v. *Great Northern R. W. Co.*, 2 Q. B. D. 224, referred to.

Semble, that, if the leases and license prejudiced the rights acquired by the suppliant under his ferry grant, he would be entitled to a writ of *scire facias* to repeal them.

H. Aylen, Q.C., for the suppliant.

Fitzpatrick, Q.C., S.-G., and *E. L. Newcombe*, Q.C., for the Crown.

[11TH JUNE, 1900.

LAROSE v. THE QUEEN.

Crown—"Public work"—Rifle range—Injury to person—50 & 51 V. c. 16, s. 16 (c).

The suppliant was wounded by a bullet fired, during target practice, from the rifle range at Coté St. Luc, in the district of Montreal. He filed a petition of right claiming damages for the injury he thereby sustained.

Held, that the rifle range was not a "public work" within the meaning of clause (*c*) of s. 16 of the Exchequer Court Act, 50 & 51 V. c. 16, and that the Crown was not liable.

City of Quebec v. *The Queen*, 24 S. C. R. 448, referred to.

Charbonneau and *Pelletier*, for the suppliant.

E. L. Newcombe, Q.C., for the Crown.

REGINA v. HARWOOD.

Crown—Expropriation of land for canal purposes—Damage to remaining lands—Access—Undertaking to give right of way—52 V. c. 38, s. 3—Effect of, in estimating damages—Future damages—Agreement as to—Increased value by reason of public work.

The defendants owned a certain property situated in the counties of Vaudreuil and Soulanges, a portion of which was taken by the Crown for the purposes of the Soulanges canal. Access to the remaining portion of the defendants' land was cut off by the canal, but the Crown, under the provisions of 52 V. c. 38, s. 3, filed an undertaking to build and maintain a suitable road or right of way across its property for the use of the defendants. The evidence showed that the effect of this road would be to do away with all future damage arising from deprivation of access; and the Court assessed damages for past deprivation only.

2. It having been agreed between the parties in this case that the question of damages which might possibly arise in the future from any flooding of the defendants' lands should not be dealt with in the present action, the Court took cognizance of such agreement in pronouncing judgment.

3. In respect to the lands taken, the Court declined to assess compensation based upon the consideration that the lands were of more value to the Crown than they were to the defendants at the time of the taking.

Stebbing v. *Metropolitan Board of Works*, L. R. 6 Q. B. 37, and *Paint* v. *The Queen*, 2 Ex. C. R. 149, 18 S. C. R. 718, followed.

A. Globensky, for the Crown.

C. A. Harwood, for the defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Boyd, C.] [10th October, 1900.

In re ALLEN AND NASMITH.

Landlord and tenant—Lease—Covenant—Renewal—Rent.

A lease of land, upon which there were no buildings except an old shed, contained a covenant by the lessor to grant, at the expiration of the term, if requested, "another lease" to the lessee "for the further term of twenty-one years," at such rent as might be agreed on or fixed by arbitration, "such renewed lease to contain a like covenant for renewal."—

Held, that the rent for the renewal term should be based upon the value of the land at the time of the renewal, and not upon the value of the land and of buildings erected by the lessee during the term.

Van Brocklin v. *Brantford*, 20 U. C. R. 327, affirmed in appeal, 26th June, 1862, followed.

Judgment below, 31 O. R. 335, *ante* 39, affirmed.

Aylesworth, Q.C., for the appellant.

Snow, for the respondent.

HIGH COURT OF JUSTICE.

IN CHAMBERS.

[BOYD, C., 8TH OCTOBER, 1900.

In re RYAN.

Administration order—Discretion to refuse—Rules 946, 954—Fund—Savings deposit—Survivorship.

There is now a discretion, under Rules 946 and 954, in dealing with applications for administration orders, and the Judge or officer is not obliged to grant a summary order unless it appears that some good result will follow.

Order refused where the widow of an intestate was clearly entitled to a fund which was the only matter in dispute.

Where a husband deposited money with a savings company and caused an account to be opened in the names of himself and his wife jointly, "to be drawn by either or in the event of the death of either to be drawn by the survivor," and it appeared by her evidence, uncontradicted, that money of hers went into the account and that both drew from it indiscrimately:—

Held, that she was entitled as survivor to the whole fund.

W. T. J. Lee, for the applicants.

Home Smith, for the widow.

[MEREDITH, C.J., 16TH OCTOBER, 1900.

GIBSON v. NELSON.

Notice of trial—Close of pleadings—Rule 262.

A reply delivered by the plaintiff joining issue upon the statement of defence and further alleging that the facts set forth in the defence were no answer to the claim:—

Held, a joinder of issue "simply, without adding any further or other pleading thereto," within the meaning of

Rule 262; and therefore that when it was delivered the pleadings were closed, and a notice of trial thereupon served was regular.

D. L. McCarthy, for the plaintiff.

J. H. Moss, for the defendant.

BRITISH COLUMBIA.

In the Supreme Court.

[WALKEM, J., 11TH OCTOBER, 1900.

HOLTEN v. VANDALL.

Fraudulent conveyance—Collusion—Immoral consideration—13 Eliz. c. 5—Pleading—Amendment to conform to evidence.

V., a miner and prospector, in 1896 engaged B. as a servant in an hotel kept by him in Revelstoke, on the understanding that the rate of wages would be fixed when he found out what she was worth, and some weeks afterwards he fixed the rate at $50 per month. A few months afterwards V. built a house, and he and B. lived there as man and wife.

In November, 1898, V. made an assignment for the benefit of his creditors, having seven days previously conveyed to B. the house property for an alleged consideration of $1,200, as representing her wages for two years. She had never asked for wages before October, 1898, and then V. was hopelessly in debt.

Held, in an action to set aside the conveyance, on the ground of its being fraudulent under 13 Eliz. c. 5, that there was collusion between V. and B. to defeat V.'s creditors.

Held, also, that the conveyance was void on the ground that it was based on an immoral consideration; also, that, if necessary, the statement of claim could be amended to conform to the evidence.

Lindley Crease, for the plaintiffs.

Duff, for the defendants.

[DRAKE, J., 14TH OCTOBER, 1900.

YATES v. BRITISH COLUMBIA ELECTRIC R. W. CO.

Street railways—Contract with municipality—Extension of limits—Operation of cars—Action—Ratepayer.

The promoters of a street railway company entered into an agreement with a city corporation in 1888, and agreed to run cars along Douglas street to the northern boundary of the city limits. They became incorporated as a joint stock company, and in 1890 obtained a charter authorizing the construction of tramways connecting the country districts with the city system, and in pursuance of the new powers continued the Douglas street tramway northerly along the Saanich road. Traffic on this extension was discontinued in 1898, because it did not pay.

In 1892 the city limits were extended so as to include a portion of the Saanich road on which the tramway had been built.

In 1894 the company obtained a private Act for the consolidation and confirmation of their rights, powers, and privileges, and ratifying the agreement of 1888 between the city and the original promoters.

Held, in an action for a declaration that the company were bound to operate their tram system along Douglas street to the extended city limits, that the company were not bound to do so.

Quaere, whether a ratepayer could sue.

W. J. Taylor, Q.C., and *Bradburn*, for the plaintiffs.

A. E. McPhillips and *Barnard*, for the defendants.

IN THE COUNTY COURT.

[MARTIN, J., 18TH OCTOBER, 1900.

DILLON v. SINCLAIR.

Small Debts Court—Jurisdiction of—Debt—Mechanics' Lien—R. S. B. C. c. 132, ss. 26, 27.

Appeal to the County Court of Atlin from a decision of a magistrate in a Small Debts Court in favour of the plain-

tiff in an action to enforce a mechanic's lien, under ss. 26 and 27 of the Mechanics' Lien Act.

Held, that an action to enforce a mechanic's lien is not one of debt within the meaning of s. 2 of the Small Debts Act. Appeal allowed.

Sawers, for the appellant.

Jenns and *W. P. Grant*, for the respondent.

NORTH-WEST TERRITORIES

In the Supreme Court.

[FULL COURT, 6TH DECEMBER, 1898.

In re SYNOD OF DIOCESE OF QU'APPELLE.

Land Titles Act—Assurance fee—"Incumbrances"—"Conveyances."

Reference to a Judge by the Inspector of Land Titles Offices under s. 111 of the Land Titles Act, 1894, referred to the Court under s. 140.

The Synod were applying to have certain lands brought under the Act. The abstract of title shewed a patent from the Crown and several conveyances, but no incumbrances within the definition of s. 2 (8) of the Act.

The Registrar insisted that, under s. 40 (2) of the Act and item 3 of the tariff of fees, whenever there are at the time of his granting a certificate of title any incumbrances *or* conveyances registered affecting the land other than the patent from the Crown, he is required to demand payment of the insurance fees provided by s. 115.

It is provided by s. 40 (2) that where there are no incumbrances or conveyances affecting the land, no fees shall be payable under s. 115; and s. 115 provides for an assurance fee when the land is incumbered. Item 3 of the tariff provides that, in addition to the fee of $2 for the certificate in such cases, the percentage fee provided by s. 20 of 51 V. c. 20

must also be paid. The last named enactment was repealed by the Land Titles Act, 1894; and the section of that Act which provides for assurance fees is s. 115.

McGUIRE, J. (delivering the judgment of the Court)—In s. 40 (2) "incumbrances" and "conveyances" are placed on the same footing; s. 115 speaks only of "incumbered land;" item 3 imposes no fee which is not provided for in s. 115. I am not clear that the Legislature did not intend that the assurance fee should be payable whether the instruments are "incumbrances" or "conveyances." I cannot, however, satisfy myself that, if so, it has expressed such intention by the language used; that a conveyance can by any reasonble stretch be included under the term "incumbrance;" or that the land affected by a conveyance can for that reason be described as "incumbered land."

I am, therefore, of opinion that no percentage fee is chargable under the circumstances of this case.

Supreme Court of Canada.

ONTARIO.] [24TH OCTOBER, 1900.

HUNTER v. CITY OF OTTAWA.

Appeal—Ontario—Amount in dispute—Statutes—Repugnancy.

Paragraph (*f*) of s. 1 of 60 V. c. 34 (D.), which provides that, where an appeal from the Court of Appeal for Ontario depends on the amount in dispute, such amount shall be understood to be that demanded, and not that recovered, if they are different, has no operation, being repugnant to (*c*), which requires the matter in controversy *on the appeal* to exceed $1,000 to give jurisdiction.

Where two clauses of the same statute, coming into force at the same time, are repugnant, the clause placed last in point of arrangement cannot be held to supersede the other as expressing the latest mind of the legislators.

Latchford, Q.C., for the respondent.

McVeity, for the appellants.

QUEBEC.] [8TH OCTOBER, 1900.

THERRIEN v. GRAND TRUNK R. W. CO.

Railways—Farm crossings—Grand Trunk Railway of Canada—Interpretation of statutes—Railway Act of Canada—Constitutional law—Jurisdiction of Provincial Legislatures.

An owner whose lands adjoin a railway subject to the Railway Act of Canada, upon one side only, is not entitled to have a crossing over such railway under the provisions

of that Act; and the special statutes in respect to the Grand Trunk Railway of Canada do not impose any greater liability in respect to crossings than the Railway Act of Canada.

Gribble v. *Midland R. W. Co.*, [1895] 2 Ch. 827, and *Canada Southern R. W. Co.* v. *Clouse*, 13 S. C. R. 140, referred to.

The Provincial Legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of a railway subject to the provisions of the Railway Act of Canada.

Canadian Pacific R. W. Co. v. *Corporation of Parish of Notre Dame de Bonsecours*, [1899] A. C. 367, followed.

Stuart, Q.C., for the appellants.

Fitzpatrick, Q.C., S.-G., and *L. A. Taschereau*, for the respondent.

ALLAN v. PRICE.

Sale of land—Warranty of title—Eviction—Special agreement—Damages.

A sale of land, including a dam, was accompanied by a warranty of the vendor of his title. The vendee, having been evicted from the portion of the premises used for the dam, brought an action to recover back the price he paid, and for damages. The vendor tendered the price and costs of resisting the action for eviction, but denied liability for damages on the grond that there was no special agreement as to the cause of eviction under Art. 1512, C. C. The Court of Review affirmed the judgment of the Superior Court holding the tender sufficient.

Held, that the warranty of title did not constitute a special agreement which would entitle the vendee to damages under Art. 1512, C. C.

Lafleur, Q.C., and *Coté*, for the appellant.

Pentland, Q.C., for the respondent.

[26TH OCTOBER, 1900.

FRECHETTE v. SIMONEAU.

Appeal—Quebec—Jurisdiction—Amount in dispute.

An action was brought by the lessee of lands, the rental of which was $250 per annum, to have the lease cancelled as being simulated.

Held, that no amount of $2,000 or upwards was in dispute, and the appeal not relating to any title to land or tenements or annual rents within the meaning of s. 29 (*b*) of R. S. C. c. 135, the Supreme Court had no jurisdiction to hear it.

Pelletier, Q.C., for the respondent.

Fitzpatrick, Q.C., S.-G., and *L. A. Taschereau*, for the appellant.

MANITOBA.] [8TH OCTOBER, 1900.

CITY OF WINNIPEG v. CANADIAN PACIFIC R. W. CO.

Assessment and taxes—Exemption from taxation—School taxes—By-law—Validating statute—Construction.

In 1881 the plaintiffs passed a by-law, No. 148, providing for a bonus to the defendants in consideration of certain works to be undertaken by the defendants, and also providing that the defendants should be forever exempt from all "municipal taxes and rates, levies and assessments, of every nature and kind." In 1883 the Legislature of Manitoba passed an Act making valid by-law No. 148 of the city of Winnipeg, describing it as a by-law for a bonus, but omitting all reference to the exemption clause.

Held, affirming the judgment of the Court of Queen's Bench for Manitoba, 12 Man. L. R. 581, 19 Occ. N. 287, that the statute made valid the whole by-law 148, that relating to exemption from taxes, as wel as the portion recited in the Act.

Held, also, reversing the judgment, that under the by-law school taxes were included in the exemption from "all municipal taxes."

Aylesworth, Q.C., and *Aikins*, Q.C., for the appellants.

Howell, Q.C., and *Chrysler*, Q.C., for the respondents.

Exchequer Court of Canada.

[Burbidge, J., 28th June, 1900

GIBBON v. THE QUEEN.

Crown—Expropriation of lands—Intercolonial Railway—Leasehold interest—Compensation—Measure of damages.

The suppliants were lessees of certain land and premises expropriated for the Intercolonial Railway. The premises had been fitted up and were used by them for the purposes of their business as coal merchants. By the terms of the lease under which they were in possession, the term for which they held could at any time be determined by the lessors by giving six months' notice in writing, in which event the suppliants were to be paid $2,500 for the improvements they had made.

Held, that the measure of compensation to be paid to the suppliants was the value, at the time of the expropriation, of their leasehold interest in the lands and premises.

Apart from the sum payable for improvements there was no direct evidence to show what the value was. But it appeared that the suppliants had procured other premises in which to carry on their business, and that in doing so they had of necessity been at some loss, and that the cost of carrying on their business had been increased.

The amount of the loss and of increased cost of carrying on business during the six months succeeding the expropriation proceedings was, in addition to the sum mentioned, taken to represent the value to them, or to any person in a like position, of their interest in the premises.

The suppliants also contended that, if they had not been disturbed in their possession, they could have increased their business, and so have made additional profits, and they claimed compensation for the loss of such profits, but this claim was not allowed.

A. P. Barnhill, for the suppliants.

H. A. McKeown, for the Crown.

A. A. Stockton, for the St. John Terminal Railway Company, third parties.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[BOYD, C., FALCONBRIDGE, C.J., STREET, J., 5TH NOVEMBER, 1900.

PRITCHARD v. PATTISON.

Evidence—Motion—Security for costs—Nominal plaintiff—Insolvency—Affidavit—Notice of motion.

The decision of ROSE, J., *ante* 309, 19 P. R. 180, affirmed on appeal; STREET, J., dissenting.

Held, per BOYD, C., that an application for security for costs on the ground that the plaintiff is insolvent and is only nominally interested in the action, should be based on an affidavit of belief on the defendant's part that such are the facts, and such an affidavit should at least be furnished by the defendant before he attempts to establish the facts by examining the plaintiff.

Semble, that the proper practice in such a case is to have the grounds set forth in the notice of motion, as was done in *Port Rowan and Lake Shore R. W. Co.* v. *South Norfolk R. W. Co.*, 13 P. R. 327; and if this method were adopted, an affidavit of belief might be dispensed with if it was proposed to establish the facts alleged out of the mouth of the plaintiff.

Held, per FALCONBRIDGE, C.J., that the finding of ROSE, J., that the plaintiff had a substantial interest, should be adopted, and such being the position, the defendant had no right to prove the plaintiff's poverty out of his own mouth on this application.

Per STREET, J., dissenting, that the defendant was entitled to examine the plaintiff for the purpose of showing

that he was a mere nominal plaintiff suing for the benefit of another, as well as for the purpose of showing his insolvency; and the defendant could not be required to establish each particular proposition involved in his motion, in its logical order, before proceeding with the next.

Leave was given to the defendant to proceed in proper form with his application for security.

W. E. Middleton, for the defendant.

Caston, for the plaintiff.

[BOYD, C., 24TH OCTOBER, 1900.

JONES v. LINDE BRITISH REFRIGERATION CO.

Master and servant—Secret profits in service—Costs—Jus tertii.

Profits acquired by the servant or agent in the course of or in connection with his services or agency fall to the master or principal.

The manager of a cold storage company, at the request of the company, undertook to advise a meat company as to some changes in their plant, and used his position of adviser to influence the purchase by the meat company of a new plant from the defendants, who had promised him a commission on any order they might receive through his assistance. This was not disclosed to his employers or the meat company.

Held, that the transaction was one in connection with his service as manager of the cold storage company, and he could not recover a commission from the defendants.

The defendants having at first conceded the plaintiff's right to recover, and then paid the money to the cold storage company, taking a bond of indemnity, the action was dismissed without costs.

Riddell, Q.C., for the plaintiff.

H. S. Osler, for the defendants.

LANGLEY v. VANALLEN.

Bankruptcy and insolvency—Assignments and preferences—Secret agreement—Onus—Voluntary payments—Attack on—Assignee for creditors—Particular creditors—Privity.

In an action by certain creditors of an insolvent and by his assignee for the general benefit of creditors to recover from the defendants, who were also creditors of the insolvent, certain sums of money paid by the insolvent to the defendants before the assignment under the terms of an alleged secret agreement:—

Held, that the onus of proof was on the plaintiffs.

Held, also, that, the payments not being procured by oppression or extortion on the part of the plaintiffs, but being voluntary, the assignee could not recover.

Review of English cases on this point.

Nor could the other plaintiffs, not being the whole body of creditors, recover, even when using the name of the assignee as plaintiff, by virtue of an order under R. S. O. c. 147; and no privity such as would give a right of action was established between the creditor plaintiffs and the defendants by an agreement for an extension of time for payment entered into by these plaintiffs and defendants and the insolvent, prior to the alleged secret agreement.

George Kerr, for the plaintiffs.

Lynch-Staunton, Q.C., for the defendants.

[FERGUSON, J., 6TH NOVEMBER, 1900.

McHUGH v. GRAND TRUNK R. W. CO.

Executors and administrators—Lord Campbell's Act—Action by administrator—Death of sole beneficiary.

An action was brought under Lord Campbell's Act by the administrator of the estate of a person whose death was alleged to have been caused by the negligence of the defendants, to recover damages occasioned by such death, for the benefit of the mother of the deceased, who was the

only person for whose benefit an action could be brought. She died pending the action before it came to trial.

Held, that, assuming that the plaintiff was entitled to recover for the benefit of the mother, had she not died, the effect of her death was only to reduce the amount to be recovered, and there was some sum of money which at the time of her death she was beneficially entitled to receive when recovered, and this sum when recovered would constitute part of her estate and be payable to the administrator thereof. And therefore the action could be proceeded with, notwithstanding her death, but the appointment of an administrator of her estate was necessary.

W. E. Middleton, for the plaintiff.

D. L. McCarthy, for the defendants.

IN CHAMBERS.

[BOYD, C., 2ND NOVEMBER, 1900.

In re SOLICITORS.

Solicitor—Bills of costs—Taxation—Payment—Connected charges—Agreement—Unsigned bills—Delay—Overcharges.

A firm of solicitors for about eight years acted for an estate in the collection of moneys and realization of securities relating to a block of land sold by the testator. During this period the solicitors from time to time rendered statements of account to the executors and paid them cheques for balances in their hands as shewn by such statements, and also rendered detailed bills of their costs for their services, in respect of different actions and proceedings taken, though not in all cases, such bills being paid by the retention by the solicitors, without objection on the part of the executors, of part of the money collected. Two or three of the larger bills were moderated by a taxing officer shortly after they were rendered. Upon an application by the executors for taxation of all the bills after the eight years:—

Held, that this could not be regarded as one continuous dealing, keeping the right to tax in suspense till the collection or exhaustion of all the securities.

Held, also, upon the evidence, that there was no agreement between the solicitors that the right to tax generally should remain open to the executors.

As to certain of the bills of costs said not to have been actually signed by the solicitors:—

Held, that they were substantially sufficient, and, after being paid out of the funds collected, with the knowledge and sanction of the executors, they could not be treated as open to taxation after years of delay, and no specific overcharges being indicated.

In re Sutton and Elliott, 11 Q. B. D. 377, followed.

J. H. Moss, for the executors.

W. E. Middleton, for the solicitors.

[FERGUSON, J., 31ST OCTOBER, 1900.

REGINA v. RANDOLPH.

Criminal law—Theft—Summary trial—Excessive penalty—Amendment—Discharge—Further detention—Criminal Code, ss. 752, 783, 787, 800.

The defendant was prosecuted for stealing $5 in money, the property of one J. M., contrary to the form of the statute, etc., and the charge was heard and determined in a summary way by a police mgistrate.

Held, that the prosecution fell under s. 783 (*a*) of the Criminal Code, the value of the property being less than $10, and it not being charged that the offence was "stealing from the person;" and therefore s. 787 applied, and the magistrate had no power to impose a penalty of imprisonment for longer than six months.

The provisions of the Code respecting amendments to summary convictions do not apply to summary trials; and the provisions of s. 800 do not apply where the same infirmity is found in the conviction as in the commitment.

The conviction and commitment were bad for imposing an unauthorized penalty; the defendant was entitled to be

discharged upon *habeas corpus*; and an order should not be made under s. 752 for his further detention.

DuVernet, for the defendant.

J. R. Cartwright, Q.C., and *J. W. Curry*, Q.C., for the Crown.

[STREET, J., 11TH OCTOBER, 1900.

In re HOPKINS ESTATE.

Devolution of Estates Act—Payment of debts—Distinction between real and personal property.

The Devolution of Estates Act, R. S. O. c. 127, vests the real as well as the personal estate of a deceased person in his personal representatives for the purpose of paying his debts; but, except in the case of a residuary devise of real and personal estate, which is specially provided for by s. 7, the order in which the different classes of property were applicable to the payment of debts before the passing of the Act, has not been disturbed by its provisions.

W. M. Douglas, Q.C., for the executors.

Gibbons, Q.C., for Mrs. Upthegrove.

W. N. Ferguson, for F. Hopkins.

W. E. Middleton, for children of Mrs. Upthegrove and for Ida Armstrong.

[THE MASTER IN CHAMBERS, 5TH JULY, 1900.

HALL v. BOWERMAN.

Interpleader—Writ of possession—Interference with execution—Claim to land.

Upon an attempt to execute a writ of possession under a judgment against G., who was in actual possession, he was served with a notice by B. claiming the land mentioned in the writ, and informing the sheriff that the house standing thereon was locked and that he (B.) had the key. B.'s claim was as mortgagee upon default in payment of interest.

Semble, that the sheriff's duty, as soon as he received the writ, was to break open the door and give the plaintiff possession. But

Held, that, as the sheriff was not bound to consider the legality of the claim put forward, he was entitled to an interpleader order.

R. J. Maclennan, for the sheriff.

E. D. Armour, Q.C., for the plaintiff.

G. W. Holmes, for the defendant Bowerman.

QUEBEC.

In the Queen's Bench.

(APPEAL SIDE.)

[LACOSTE, C.J., BOSSE, BLANCHET, HALL, WHITE, JJ., 27TH OCTOBER, 1900.

ROY v. CANADIAN PACIFIC R. W. CO.

Railways—Fire—Sparks from engine—Negligence, absence of—Liability.

Owing to a very dry season, fire was discovered in two or three places along the defendants' right of way shortly after a train and engine had passed. In spite of efforts to control it, this fire spread and injured the plaintiff's wood lot, and he brought this action for damages. The trial Judge held that the fire was caused either by sparks from the engine or originated in some way from the train—he did not determine which—and that this created a presumption of negligence which the defendants had not rebutted. Judgment was accordingly given for $300.

On appeal the defendants contended that their use of engines being in the exercise of a statutory right, it devolved upon the plaintiff to prove affirmatively that the appellants had been guity of negligence, either by using a defective engine or by shewing carelessness or a want of skill in its management.

Held, that the French law, and consequently the law in the Province of Quebec, is that the railway company are responsible, notwithstanding the adoption of every means of precaution known to science. The English authorities are not binding in a case pertaining to civil rights and liabilities: Holt's Canadian Railway Law, p. 18; *Jodin* v. *South Eastern R. W. Co.*, Q. R. 1 S. C. 316; *Grand Trunk R. W. Co.* v. *Meegan,* M. L. R. 1 Q. B. 364; *North Shore R. W. Co.* v. *McWillie,* M. L. R. 5 Q. B. 364.

The Supreme Court of Canada has tacitly recognized the distinction between the law of Quebec and that of the other provinces respecting the question of liability for damage caused by sparks from an engine, in the absence of negligence: *North Shore R. W. Co.* v. *McWillie,* 17 S. C. R. 511.

Even in countries where it is generally admitted that the statutory authorization to use engines has taken away the common law liability and left the railway companies responsible for negligence alone, the rule thus laid down in *Rex* v. *Pease,* 4 B. & Ad. 30, *Vaughan* v. *Taff Valley R. W. Co.*, 5 H. & N. 59, and similar cases, has sometimes been doubted and evaded: see per Bramwell, L.J., in *Powell* v. *Fall,* 5 Q. B. D. 597; *Ball* v. *Grand Trunk R. W. Co.*, 16 C. P. 252.

Judgment affirmed.

In the Court of Review.

[TAIT, C.J., TASCHEREAU, DOHERTY, GILL, JJ., 27TH OCTOBER, 1900.

WRIGHT v. CANADIAN PACIFIC R. W. CO.

Solicitors—Dissolution of firm—Notice of motion—Signature.

A motion made on behalf of the defendants for the peremption (extinguishment) of the suit was granted by the Court below.

On appeal it appeared that the defendants had originally been represented by Messrs. Abbotts, Campbell, & Meredith. Mr. Harry Abbott having died in the interval, the firm had

been dissolved,—but the notice of motion for peremption had been signed "Abbotts, Campbell, & Meredith, per C. S. Campbell, one of the attorneys for the defendants."

Held, GILL, J., dissenting, that the signature was contrary to the jurisprudence of the province. The motion might properly have been signed—"Campbell & Meredith." But as it was, it was signed in the name of the dissolved firm, and the motion did not purport to be made by the surviving members of the dissolved firm, but merely by one of them, signing for that firm. If that were allowed the opposite party might be called upon to answer any proceedings signed by any member of the former firm.

Judgment reversed.

In the Superior Court.

[TASCHEREAU, J., 26TH OCTOBER, 1900.

RENAUD v. LAMOTHE.

Will—Bequest—Condition—Restraint of religious liberty—Public policy—Quebec law.

Louis Renaud died in 1878, leaving a will by which the usufruct of his estate was given to his widow for life, and afterwards to his children for their lives, and the estate then to be divided amongst his grandchildren, whom he instituted his universal legatees. A clause in the will provided that if any of his sons should marry otherwise than according to the rites of the Roman Catholic church, the issue of such marriage should be excluded from the succession, as should also any grandchildren who were not brought up and instructed in that faith.

One of the sons married contrary to this provision, and his son, the plaintiff in this action, was not brought up in the Roman Catholic faith. He now sought to recover from the executors (the defendants) certain revenue which it was admitted would be due him were it not for the above clause. His contention was that that clause imposed a condition which was both illegal and contrary to public order and policy, being in restraint of the free exercise of religion.

"Gifts inter vivos or by will may be conditional. An impossible condition, or one contrary to good morals, to law, or to public order, upon which a gift inter vivos depends, is void, and renders void the disposition itself, as in other contracts. In a will, such a condition is considered as not written and does not annul the disposition:" Art. 760, C. C.

Held, following *Kimpton* v. *Kimpton,* 16 Rev. Leg. 361, that the condition was void, being in restraint of religious liberty, and therefore contrary to public policy.

Hodgson v. *Halford,* 11 Ch. D. 959, being a case under the English law on the subject, not applicable in the Province of Quebec.

Executors directed to pay over revenue claimed.

W. J. White, Q.C., and *A. W. P. Buchanan,* for the plaintiff.

G. Lamothe, Q.C., and *P. Trudel,* for the defendants.

[CURRAN, J., 19TH OCTOBER, 1900.

CANADIAN PACIFIC R. W. CO v. ALLAN.

Statute—Imperative or directory—Performance of public duty.

The respondents were municipal councillors of Verdun, where the petitioners owned property. On the 23rd August the secretary of the council gave notice that, in accordance with Art. 746 A of the Municipal Code, a session would be held on the 4th September for the purpose of revising the valuation roll. On the latter day an adjournment was made for two weeks.

The petitioners obtained an interlocutory injunction restraining the respondents from proceeding with the proposed revision. The petitioners contended, inter alia, that the authority of the respondents to make such revision had expired, and that they are now *functi officio.* The words of Art. 746 A are: "The local council shall, in any year in which a new valuation roll is not made, revise and amend the valuation roll in force. . . . Such revision takes place in the months of September or October in the judicial districts of Gaspe, Rimouski, etc., and during the months of June or July in the other districts of the province."

Held, that the words of the Article did not make it imperative that the revision should take place in June or July: Endlich on Construction of Statutes, s. 295, p. 399.

Held, further, that, even if the words were imperative, the Court had power to compel the performance of a public duty by public officers, though the statutory time for performing the duty had passed: *Dechene* v. *Fairbairn,* 2 M. L. R. 442.

Injunction dissolved and petition dismissed with costs.

C. S. Campbell, Q.C., for the petitioners.

W. L. Bond, for the respondents.

[ARCHIBALD, J., 16TH OCTOBER, 1900.

ROUSSEL v. AUMAIS.

Ferry—Public carrier—Negligence of private carrier.

The defendant was the proprietor of a small ferry across the Ottawa river. He was engaged in other occupations, and the boat made no regular trips; but whenever anyone came asking that he and his property should be taken across, the defendant and his employees left their other work, rowed them across, and charged for doing so. The plaintiffs and his companion were being rowed across, and had two horses aboard, which they themselves had embarked, acting under instructions given by the defendant. In the middle of the stream the boat veered suddenly, one of the horses became frightened, and (there being no railings or other protection) jumped into the water and was drowned.

Held, that the defendant was not a common carrier.

Held, further, that the defendant being under no obligation to provide a safer boat, and the plaintiff electing to take the risk and to remain in charge of his own animals while crossing, the defendant was not liable for negligence as a private carrier.

Nugent v. *Smith,* 45 L. J. Ex. 707, *Blower* v. *Great Western R. W. Co.,* L. R. 7 C. P. 655, and *Kendall* v. *London and South Western R. W. Co.,* L. R. 7 Ex. 373, followed.

Action dismissed with costs.

MANITOBA.

In the Queen's Bench.

[DUBUC, J., 23RD OCTOBER, 1900.

STOBART v. FORBES.

Chose in action—Assignment of—Beneficial interest—Action by assignee—Interest of debtor.

The plaintiffs sued to recover for goods sold by them and Peck & Co. and Codville & Co., the claims of the latter firms having been assigned to the plaintiffs to avoid bringing two other actions. The defence raised the objection that the claims assigned to the plaintiffs were merely held in trust by them and that the plaintiffs were not beneficially entitled thereto or interested therein; (2) that the plaintiffs, being a corporation under the Joint Stock Companies Act, were not empowered to become assignees and could not sue for claims other than their own.

Held, that under the Assignments Act, R. S. M. c. 7, s. 3, the assignee of debts and choses in action may bring an action thereon in his own name, although they have been transferred only for the purpose of joining a number of claims in one suit, and the assignee has no beneficial interest in them: *Mussen* v. *Great North-West Central R. W. Co.*, 12 Man. L. R. 574, 19 Occ. N. 285.

2. That the defendant had no interest whatever in the assignments, and was in no way prejudiced by them; he was a mere stranger to the assignments, and not competent to raise the point in question: *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.

Judgment for the plaintiffs.

Howell, Q.C., and *Mathers*, for the plaintiffs.

Crawford, Q.C., for the defendant.

BRITISH COLUMBIA.

In the Supreme Court.

[McColl, C.J., 16th June, 1900.

YORKSHIRE GUARANTEE AND SECURITIES CORPORATION v. EDMONDS.

Land Registry Act—Registered judgment—Mortgage—Priorities.

An action for foreclosure. None of the defendants contested the action save the Bank of British Columbia. The question to be decided was whether the plaintiffs had priority over the claimants, as to a part of the lands mortgaged. The plaintiffs claimed by virtue of a mortgage executed by the defendant H. L. Edmonds on the 6th March, 1893. Application for registration of the same was filed on the 7th March, 1893, at 11.40 a.m., and the mortgage was registered on the 6th July, 1894. The defendants the Bank of British Columbia claimed by virtue of a judgment obtained by them against the defendant H. L. Edmonds. Application for registration of the same was filed in the Land Registry Office on the 7th March, 1893, at 11.10 a.m., and the judgment was registered on the 27th March, 1893. Execution issued on this judgment, and on the 14th December, 1894, the sheriff sold, at public auction, the land in question to E. A. Wyld, an officer of the Bank of British Columbia, and executed a conveyance to him, and Wyld thereupon conveyed the land to the Bank of British Columbia, and the Registrar issued a certificate of title to the bank free from all incumbrances.

Held, that a registered judgment binds only the interest of the debtor existing at the time of registration, and therefore cannot affect a mortgage already given by the debtor, although such mortgage is not registered before the judgment.

Judgment for the plaintiffs as against the bank with costs.

McPhillips, Q.C., for the plaintiffs.

Davis, Q.C., for the defendants the Bank of British Columbia.

[DRAKE, J., 15TH SEPTEMBER, 1900.

ALASKA STEAMSHIP CO v. MACAULAY.

Costs—Security for—Foreign company carrying on business in British Columbia.

Summons for security for costs from the plaintiff, a company incorporated in the State of Washington, and having its head office in Seattle. The company owned a steamer running between Seattle and Victoria, and had an office in Victoria managed by a freight and passenger agent, who devoted his whole time to the business of the company in Victoria, and who was paid a salary by the company. Rent and all office expenses were paid by the company, which was not licensed or registered in British Columbia.

Held, that the company was a foreign company within the meaning of s. 144 of the Companies Act, and was bound to give security for costs.

La Bourgogne, [1899] P. 1, [1899] A. C. 431, considered.

Cassidy, for the summons.

J. H. Lawson, contra.

[20TH SEPTEMBER, 1900.

MERCHANTS BANK v. HOUSTON.

Costs—Defendants severing—Liability to plaintiff.

Reference to a Judge under Rule 801 by the District Registrar at Nelson on taxation of a bill of costs. The defendants separated in their defence, and the judgment was for the plaintiff against all the defendants.

Held, that the plaintiff was entitled to costs against the defendants jointly, and each defendant was liable for the costs of his separate defence, but not liable for any costs occasioned solely by the other.

Stumm v. *Dixon*, 22 Q. B. D. 99, followed.

Supreme Court of Canada.

QUEBEC.] [8TH OCTOBER, 1900.

PRICE v. LEBLOND.

Landlord and tenant—Emphyteusis—Bail-à-rente—Petitory action—Transfer by lessee.

An instrument by which lands were leased for sixteen years at an annual rental, subject to a renewal for a further term of twelve years, provided for the construction of certain buildings and improvements by the lessee upon the leased premises, and hypothecated these contemplated ameliorations to secure payment of rent and performance of the obligations of the lessee. On disturbance, an action, with both petitory and possessory conclusions, was brought by a transferee of the lessee against an alleged trespasser. who pleaded title and possession in himself without taking objection to its cumulative form.

Held, affirming the judgment below, that, under the circumstances, the action should be treated as petitory only; that the contract uunder the instrument described was neither emphyteusis nor a *bail-à-rente* (lease in perpetuity), but merely an ordinary contract of lease which conveyed no title to land or real rights sufficient to confer upon the transferee the right to institute a petitory action.

Held, also, that a deed of sale from the lessee would not support the petitory action, as the lessee could not transfer proprietory rights which he did not himself possess.

Stuart, Q.C., for the appellant.

Fitzpatrick, Q.C., and *L. A. Taschereau,* for the respondent.

NOVA SCOTIA.]

MICHAELS v. MICHAELS.

Husband and wife—Separate property of wife—Action by wife against husband—Married Woman's Property Acts (N. S.)

In 1882 the respondent, A. L. Michaels, made a promissory note for $10,000 in favour of Jenny Levy, payable on demand. This note was indorsed by the payee to her sister, the maker's wife. In 1899 an action was brought on the note by the indorsee against her husband, the maker, which at the trial was dismissed on the ground that the Married Woman's Property Act did not authorize such an action: 19 Occ. N. 326. On appeal to the Court en banc the Judges were equally divided in opinion, and the judgment at the trial stood affirmed: *ante* 136.

By R. S. N. S., 5th ser., c. 94, a married woman in Nova Scotia holds her separate personal property, not reduced into possession by her husband, as if she were a *feme sole*, and the Act of 1898, c. 22, gives her the same civil remedies against every person, including her husband, as an unmarried woman has.

Held, reversing the judgment below, that the note sued on was personal property of the wife not reduced into possession, and the action could be maintained under the above Acts by the wife against her husband.

Borden, Q.C., for the appellant.

Mellish, for the respondent.

HAMILTON v. GRANT.

Company—Judgment creditor—Action against shareholder—Transfer of shares—Evidence.

Judgment creditors of an incorporated company, being unable to realize anything on their judgment, brought action against H. as a shareholder, in which they failed, from inability to prove that he was owner of any shares. They then brought action against G., in which evidence was given, not produced in the former case, that the shares once held

by G. had been transferred to H., but were not registered in the company's books. On this evidence the Court below gave judgment in favour of G.

Held, affirming such judgment, that the shares were duly transferred to H., though not registered, as it appeared that H. had acted for some time as president of and executed documents for the company, and the only way he could have held shares entitling him to do so was by transfer from G.

Held, also, that, although there appeared to be a failure of justice from the result of the two actions, the inability of the plaintiffs to prove their case against H. in the first could not affect the rights of G. in the subsequent suit.

The company in which G. held stock was incorporated in 1886 and empowered to build a certain line of railway. In 1890 an Act was passed authorizing additional works to be constructed, increasing the capital stock, appointing an entirely different set of directors, and giving the company larger powers. One clause repealed all Acts and parts of Acts inconsistent therewith. G. had transferred his shares before the later Act came into force. The judgment against the company was recovered in 1895.

Held, that G. was never a shareholder of the company against whom such judgment was obtained.

Judgment of the Court below affirmed.

Cahan, for the appellants.

Newcombe, Q.C., and *Mellish,* for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

BOYD, C.] [11TH OCTOBER, 1900.

PEDLOW v. TOWN OF RENFREW.

Way—Highway—Plan—Dedication—Municipal corporations.

The owners of two adjoining lots agreed between themselves to give twenty feet of each lot to form a street, and

a plan of sub-division of the lots showing a street of this width was filed by them, the consent of the municipality being given by resolution. The line fence was then taken down, and one owner fenced his land so as to leave twenty feet of the lot open to the public, but the other fenced his so as to leave forty feet. Without any by-law or further resolution the municipality did some grading on the sixty feet, and the sixty feet were used by the public for the purpose of a highway.

Held, that the giving of forty feet by the one owner did not relieve the other owner from his obligation to give twenty feet, and that he could not, after the expenditure of public money upon it and its user by the public, retract the dedication of the twenty-foot strip.

Judgment of BOYD, C., 31 O. R. 499, *ante* 101, affirmed.

Aylesworth, Q.C., and *T. W. McGarry*, for the appellant.

S. H. Blake, Q.C., for the respondents.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACMAHON, J., 12TH NOVEMBER, 1900.

JONES v. TOWNSHIP OF STEPHENSON.

Municipal corporations—Damages—Non-repair of highway—Notice of accident—Joint liability—Waiver.

The notice of the accident and the cause thereof required by s. 606 (3) of the Municipal Act, R. S. O. c. 223, must now, by 62 V. c. 25, s. 39, be given to each of the municipalities where the claim is against two or more as jointly responsible for the repair of the road. *Leizert* v. *Township of Matilda*, 26 A. R. 1, is therefore not now applicable.

Where notice in writing was given to one township municipality of two sued as jointly liable, but not to the other, it appeared that the reeve of the latter had been verbally notified by the plaintiff, and had then promised to write and had written to the reeve of the former, after which both reeves attended with the plaintiff and examined the place of the accident, and the reeve of the latter afterwards wrote to

the plaintiff advising him that the township corporation did not recognize his claim because it was considered that the loss arose from the fault of the plaintiff; and all this within thirty days after the accident.

Held, that there was no waiver.

Lindsey, Q.C., for the plaintiff.

DuVernet and *A. A. Mahaffy,* for the defendant.

[FALCONBRIDGE, C.J., STREET, J., 13TH NOVEMBER, 1900.

MURRAY v. WURTELE,

Revivor—Substituted plaintiff—Absence of consent—Liability for costs—Transfer of right pendente lite—Stay of proceedings.

It may in rare cases, such as *Chambers* v. *Kitchen,* 16 P. R. 219, be "necessary or desirable" under Rule 396 to add or substitute a person as plaintiff, without the consent required by Rule 206 (3), upon the application of the opposite party; but where it becomes necessary to substitute a person as plaintiff without his consent, to prevent injustice, he should not be exposed, without some further action on his part or adoption by him of the position into which he is forced, to any liability for damages or costs.

Under the circumstances of this case, the fact that F. had become *pendente lite* the transferee of the promissory note sued on did not entitle the defendants to an order substituting him as plaintiff and making him liable for the costs of the action.

But the original plaintiff could not be allowed to prosecute the action further, because he had no longer any interest in it, and F. could not be allowed to do so, because he had not caused himself to be substituted as a plaintiff nor obtained leave to proceed in his own name upon the judgment pronounced in favour of the plaintiff, which had not been entered, but from which the defendants sought to appeal; and all further proceedings in the action should, therefore, be stayed, but without costs.

J. H. Moss, for the plaintiff and Thomas Fraser.

J. E. Jones, for the defendants.

[17TH NOVEMBER, 1900.

MACDONALD v. SHEPPARD PUBLISHING CO.

Discovery—Defamation—Justification—Immorality—Disclosure of name of paramour.

The defendants having in their newspaper charged the plaintiff with immorality, the plaintiff sued them for libel, and the defendants pleaded that the charge was true. The plaintiff having required particulars, the defendants set forth that the plaintiff lived at a house of ill-fame; that he lived at a particular place in adultery; that a child was born to the woman with whom he lived; and that he brought to his house and kept with the members of his family a woman who had lived in a house of ill-fame. The plaintiff, being examined for discovery, admitted that he had lived in adultery with a woman who had previously lived in a house of ill-fame, and that she bore a child of which he was not the father, but denied the other allegations of the particulars.

Held, that the plaintiff was bound to disclose the name of the woman, although such disclosure might injure her.

Bradford, for the plaintiff.

Riddell, Q.C., for the defendants.

MILLAR v. THOMPSON.

Attachment of debts—Fraud—Issue—Amount in controversy—County Court—Jurisdiction—Residence of garnishee—Rules 917, 918, 919—Receiving order.

Where it was charged by a judgment creditor that a fraudulent arrangement had been made between the judgment debtor and his employers, the garnishees, whereby a third person had been substituted for the debtor, as the servant of the garnishees and money paid to such third person, while the debtor continued to do the work:—

Held, that the judgment creditor was entitled to have an issue directed, to which the third person should be a party, to determine whether there was at the time of the

service of the attaching order any debt due or accruing from the garnishees to the debtor, without bringing home a case of fraud to the persons against whom it was charged; it was sufficient to shew unexplained facts and circumstances so unusual as to create a strong suspicion that fraud had been practised.

Held, also, that, upon the proper construction of Rules 917, 918, and 919, the Judge of a County Court in which the judgment has been recovered has power, when the amount claimed to be due from the garnishee is so large as not to be within the jurisdiction of a County Court, to make the garnishing summons returnable before himself, even where the garnishee resides in another county.

Held, also, that an order for a receiver should not be made in respect of a fund which may be reached by garnishing process.

Idington, Q.C., for the plaintiffs.

R. N. Ball, for the defendant and others interested.

[ROSE, J., 2ND NOVEMBER, 1900.

In re GEDDES AND GARDE.

In re GEDDES AND COCHRANE.

Landlord and tenant—Renewal lease—Rent—Construction of lease.

A clause in a lease providing for a renewal stated that the renewal lease was to be "at such increased rent as may be determined upon as hereinafter mentioned, payable in like manner and under and subject to the like covenants, provisions, and agreements as are contained in these presents, including the covenant for renewal, such rent to be determined by three different disinterested persons as arbitrators."

The lease further provided for payment of the yearly rent as follows: "For the first ten years of the said term eighty dollars per annum; for the remaining eleven years one

hundred dollars per annum; all the said payments to be made half-yearly on the first day of January and July in each year."

Held, that the proper manner by which the rent should be increased during the renewal term was by adding to each payment during the twenty-one years, that is to say, adding to the rent of $80 per annum for the first ten years of the renewal term and to the rent of $100 per annum for the remaining ten years of the renewal term,—and not by adding together the annual payments for twenty-one years and making an addition to that, nor by adding to the sum payable during the last year before the renewal.

Held, also, that the condition as to the rent for the new term being an increased rent might be satisfied by making a merely nominal addition, whereas here, there was no increase in the rentable value of the premises.

Riddell, Q.C., and *J. MacGregor*, for the tenants.

H. D. Gamble, for the landlord.

[6TH NOVEMBER, 1900.

GRAVES v. GORRIE.

Copyright—Works of fine art—Imperial Act—Extension to Colonies.

The Imperial Act 25 & 26 V. c. 68, being an Act for amending the law relating to copyright in works of fine art and for repressing the commission of fraud in the production and sale of such works, does not extend to the Colonies, but the copyright therein and thereby conferred is confined to the United Kingdom.

J. T. Small, for the plaintiffs.

J. H. Denton, for the defendants.

[STREET, J., 5TH OCTOBER, 1900.

LOVE v. LATIMER.

Trade-name—Sale of business—Right to use name.

The proprietor of a firm name of no pecuniary value *per se*, and not being merely his own name, who has sold

the business with which it was connected, and with it the right to use the firm name for a limited period, cannot, after the expiry of the time, prevent the user of such name, when he himself does not carry on or intend to carry on business under it.

Meek, for the plaintiff.

Heighington, for the defendant.

[10TH OCTOBER, 1900.

WILLIAMS v. TOWN OF CORNWALL.

Municipal corporations—Highway—Obstruction—Dwelling house—Projection from—Statutes—Lowering grade—Compensation.

A survey of the town of Cornwall was confirmed by 47 V. c. 50 (O.). This Act declared the survey to lay down correctly the lines of the street as originally laid out, and provided that:—"Where any dwelling house or shop . . . had been before the 1st January, 1888, partly built upon any street as ascertained by said survey, it shall not be incumbent upon the owner or occupant of such dwelling house, shop, or building to remove the same off such street until the rebuilding of such dwelling house, shop, or building, or the repairing thereof to the extent of 50 per cent. of the then cash value thereof; but this proviso shall not apply to any fence, steps, platform, sign, porch, or projection attached to any such dwelling house or shop."

The survey showed that a certain dwelling encroached four feet upon the street, and that the verandah attached to it encroached three feet six inches further upon the street. This verandah was made of wood, rested on stone pillars, had its own roof, and was firmly attached to the house.

Held, that the verandah was an integral part of the dwelling house and not a porch or projection attached to it, and was not to be considered an obstruction on the street which should be removed, within the above proviso.

Held, therefore, that the position of the dwelling house and verandah did not bar the owner from applying for com-

pensation under the Municipal Act for damages sustained by reason of the corporation having lowered the grade of the street in front to an extent interfering with his access.

D. B. Maclennan, Q.C., for the plaintiff.

Leitch, Q.C., for the defendants.

[MEREDITH, J., 14TH NOVEMBER, 1900.

CONLEY v. CANADIAN PACIFIC RAILWAY CO.

Railways—Consignor and consignee—Delivery to wrong person—Liability.

The plaintiff consigned to the defendants certain goods addressed to the 'I. C. Company' simply. He knew that the company had not yet been incorporated; he also knew that the defendants' practice was never to deliver goods consigned "to order" without the production and indorsement of the shipping bill, but that when not consigned "to order" they did sometimes deliver the goods without the production of the shipping bill. The defendants did deliver the goods to a person carrying on business under the name of the I. C. Company, and at the ostensible office of the company.

Held, that the plaintiff was most to blame for such delivery, and that the defendants were not liable by reason of their having delivered the goods without first requiring the production of the shipping bills. There is no law here requiring carriers to take up the shipping bills before the delivery of goods.

F. D. Davis, for the plaintiff.

Aylesworth, Q. C., and *Shirley Denison*, for the defendants.

NOVA SCOTIA.

In the County Court.

IN CHAMBERS.

[SAVARY, Co. J., 1ST NOVEMBER, 1899.

SHAFNER v. BAILEY.

Absent or absconding debtors—Order 46—Writ of attachment—Motion to set aside—Costs.

This was an application to set aside a writ of attachment and all subsequent proceedings thereupon, on the ground that the defendant had returned to the Province since the issue of the writ, and, though absent, was not absconding, when the writ issued. The facts are set out in the opinion.

F. L. Milner, for the plaintiffs.

J. G. H. Parker, for the defendant.

SAVARY, Co.J.—The defendant was no doubt "absent out of the Province" when the summons and attachment were issued, and the question is, whether he was so under such conditions as to be subject to the provisions of Order 46, which represents the old statutes on the subject. In the absence of any decision, I should hold that he was. He had left the Province in order to work as an employee in a certain business at Lubec, in the State of Maine, although he had left his family here, but they might have gone and joined him there at any time, and he could at any time have there executed deeds of his property which would deprive his creditors here of any remedy during the delay which whould result in securing service on him out of the jurisdiction, to say nothing of discovering his whereabouts.

But there are several very luminous decisions under the old statute, one of which, *Starr* v. *Munsey*, 3 N. S. Reps. 244, is cited by counsel. There the defendant had two

places of business, one in the Province and one out of it, and was in the habit of passing between the two places in the regular course of the seasons, and it was only when he gave up the one in the Province and moved away from it entirely with his family, that he was deemed to come within the application of the Act. This defendant, on the contrary, only swears that he had "before been employed in the same business and in the same place," *i.e.*, in Lubec, in the State of Maine. He does not say when or how long or that to go there at a certain season and return at another was his well-known and regular course of business.

A feature that seems to me to have a peculiar significance is that the defendant had, not long before leaving, given a note to the plaintiffs payable at a bank in Bridgetown, and had gone away without making any provision for it and never communicated with the plaintiffs about it down to the time the attachment issued.

The case of *Murdoch* v. *Hughes*, James 388, is easily distinguishable from this. The continued absence of the defendant in that case was owing to unavoidable circumstances and fully accounted for. In *Hunt* v. *Soule*, 1 Thom. 206, the Chief Justice, repeating and re-affirming the doctrine laid down in *Starr* v. *Munsey*, that the temporary absence of the defendant on business or pleasure should not render his property liable to attachment, affirmed the decision in *Starr* v. *Munsey* that "the mere return of the defendant into the Province would not authorize the Court to set aside the process, if circumstances authorized the plaintiff to deem the defendant an absent or absconding debtor when he sued out the process," and went on to lay it down that "if the defendant is actually absent and out of the jurisdiction of the Court at the time the process issues, then it is incumbent on him, the defendant, to establish, to the entire satisfaction of the Court, that his absence was merely temporary, and that it was an abuse of the process of the Court to sue out such a writ, before they should exercise their summary jurisdiction."

I come to this conclusion without reference to what I call the hearsay evidence in the plaintiffs' affidavits, viz., the

statements made to them by O. T. Daniels, solicitor, and Egbert O. Kinney. The former told one of them that he had sent or was about to send to the defendant at Lubec for execution there a deed to Kinney of the defendant's property, and Kinney in conversation with one of the plaintiffs told him that he had bargained for the purchase of the defendant's livery stable property at Bridgetown, a property and business that the defendant did not give his personal attention to at all. In consequence of hearing this, the plaintiffs, as any reasonable man would, issued the process which I am now asked to set aside, and which, in the words of the Court in *Starr* v. *Munsey* and *Hunt* v. *Soule*, should only be set aside when it is manifestly "unncessary and vexatious and an abuse of the process of the Court."

If the statements spoken were true, the interference with his plans by the attachment probably led to his return. If the affidavits of these two informants had been obtained, they would have been conclusive under the case of *Starr* v. *Munsey*. Counsel for the plaintiffs reminded me of the probable difficulty of getting from either of them affidavits hostile to a party with whom they were thus engaged in negotiating together in a friendly way a mutually satisfactory piece of business, and to compel a party to make an affidavit is a delicate and tedious process. Neither of these men could have had any object in making such a statement if it were not true, but I doubt if I could judicially accept such an unsworn statement, however much I might be morally convinced of its accuracy. I shall dismiss the motion, but, as an appearance has been entered, I shall follow DesBarres, J., in *Rent* v. *Adlington*, 2 R. & G. 1, and order that the costs abide the event.

NEW BRUNSWICK.

In the Supreme Court.

[FULL COURT, 13TH NOVEMBER, 1900.

In re GAMBLE v. WARD.

Seaman's wages—Stipendiary magistrate—Jurisdiction—Complaint.

One Gamble, a seaman, sued Ward, the master of a vessle, for wages, in the Court of a stipendiary magistrate. The magistrate made an order that the master should pay Gamble the sum of $42.20 for wages, besides his costs of suit. The magistrate's order having been brought up on *certiorari*, a motion was made to quash it, on the ground that the complaint made before the magistrate did not show that the vessel was registered in any Province of Canada. It was proved at the trial before the magistrate that the vessel was registered at the port of Dorchester, in the county of Westmorland and Province of New Brunswick.

Held, that the subsequent evidence did not cure the defect in the complaint, and the rule to quash must be made absolute.

Teed, Q.C., for the motion.

F. St. John Bliss, contra.

IN EQUITY.

[BARKER, J.

In re WIGGINS ESTATE.

Trustee—Commission—Personal estate—Income—Investments.

No fixed rule can be laid down as to the commission trustees will be allowed by the Court, as each case must be

governed by its own circumstances, and by a consideration of the trouble experienced in the management of the estate.

Where trustees of an estate consisting of stocks and mortgages received under the deed of trust a commission of five per cent. on income, a commission on the estate was refused, but a commission of one per cent. was allowed on investments made by them.

A. O. Earle, Q.C., for the trustees.

G. C. Coster, for the estate.

BLACK v. MOORE.

Fraudulent conveyance—13 Eliz. c. 5—Foreign assignment of personal property in New Brunswick—"Mobilia sequuntur personam"—Conflict of laws—Onus of proof—Garnishment—Equitable execution.

A share in the annual income of an estate in Ireland payable under will, through the hands of the executors living in New Brunswick, to the beneficiary living and domiciled in Massachusetts, was assigned by the beneficiary by assignment executed in Massachusetts to a trustee in trust, first to maintain the assignor and his family, and, second, to pay his creditors a limited sum. In a suit in this Province to set aside the assignment as fraudulent and void against a judgment creditor of the assignor, under 13 Eliz. c. 5:—

Held, that the validity of the assignment should not be determined by the *lex domicilii* of the assignor; (2) that, assuming that the validity of the assignment should be determined by the law of Massachusetts, the onus of proving that the assignment was invalid by that law was upon the defendant, and that, in the absence of such proof, it must be assumed that the law of Massachusetts was the same as that of New Brunswick; (3) that, as the money coming into the hands of the executor was liable to attachment under 45 V. c. 17, s. 21, or to equitable execution, the plaintiff was prejudiced by the assignment within 13 Eliz. c. 5.

F. St. John Bliss, for the plaintiff.

G. W. Allen, Q.C., for the defendants.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 17TH SEPTEMBER, 1900.

BANK OF BRITISH COLUMBIA v. TRAPP.

Discovery—Examination for—Nature of—Cross-examination—Rule 703—Retroactivity.

Upon the examination for discovery of the defendants certain questions were objected to, on the ground that they were in the nature of cross-examination. The examination was adjourned for the purpose of bringing the matter before a Judge in Chambers, and on the 30th May, 1900, MARTIN, J., made an order requiring the defendants to answer the questions objected to. The defendants appealed to the full Court.

Owing to some doubt as to the construction to be placed on the Rules providing for examinations for discovery, on the 15th June, 1900, Rule 703 was amended so as expressly to sanction cross-examination.

Held, dismissing the appeal, that the examination for discovery under Rule 703 (even before the amendment) was in the nature of a cross-examination, but limited to the issues raised in the pleadings.

Carroll v. *Golden Cache Mines Co.*, 6 Brit. Col. L. R. 354, overruled.

The amendment of 15th June, 1900, is retroactive.

Howay (*Dockrill* with him), for the appellants.

THE CANADIAN LAW TIMES

ANNUAL DIGEST

OF CANADIAN CASES REPORTED AND NOTED DURING THE YEAR 1900,

DECIDED IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, IN THE SUPREME AND EXCHEQUER COURTS OF CANADA, AND IN THE COURTS OF ALL THE PROVINCES,

AND

A BRIEF SUPPLEMENTARY DIGEST OF UNREPORTED CASES DECIDED BY THE COURT OF APPEAL AND HIGH COURT OF JUSTICE, ONTARIO, DURING THE YEAR 1900,

TOGETHER WITH

A TABLE OF THE CASES DIGESTED

(With References also to the Occasional Notes for 1900).

AND A TABLE OF THE CASES AFFIRMED, FOLLOWED, ETC., IN THE CASES DIGESTED.

EDITED BY

EDWARD B. BROWN, B.A.,

Of Osgoode Hall, Barrister-at-Law.

TORONTO:

THE CARSWELL CO., LIMITED, 30 ADELAIDE STREET EAST,

1901.

Entered according to Act of the Parliament of Canada, in the year one thousand nine hundred and one, by THE CARSWELL Co. Limited, in the office of the Minister of Agriculture.

List of Reports containing the Cases comprised in this Digest, with the Mode of Citation.

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Walker v. City of Halifax, 16 N. S. Reps. 371, Cass. Dig. 175. followed in Kennedy v. Rural Municipality of Portage La Prairie, 20 Occ. N. 26, 12 Man. L. R. 634 439

Walker v. Foster, 22 N. S. Reps. 156, reversed in *S.C.*, 20 Occ. N. 196, 30 S. C. R. 299 195

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Webster v. Crickmore, 25 A. R. 97, distinguished in Kirby v. Rathbun Co., 20 Occ. N. 333, 32 O. R. 9 80

Willcock v. Terrell, 3 Ex. D. 323, followed in Stewart v. Jones, 20 Occ. N. 380, 19 P. R. 227 (but see 21 Occ. N. 141) 366

Windsor and Annapolis R. W. Co. v. The Queen, 11 App. Cas. 607, considered in Regina v. Mowat, 1 Terr. L. R. 146 144

Winnipeg, City of, v. Canadian Pacific R. W. Co., 19 Occ. N. 287, 12 Man. L. R. 581, in part affirmed in *S. C.*, 20 Occ. N. 433 33

Wittman v. Oppenheim, 27 Ch. D. 260, followed in Anglo-Canadian Music Publishing Assn. v. Somerville, 20 Occ. N. 120, 19 P. R. 113 117

Wood v. Canadian Pacific R. W. Co., 6 Brit. Col. L. R. 561, affirmed in *S.C.*, 20 Occ. N. 30, 30 S. C. R. 110 363

Wood v. McAlpine, 1 A. R. 234, distinguished in Mussen v. Great North-West Central R. W. Co., 19 Occ. N. 117, 285, 12 Man. L. R. 574 74

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Wright v. Canadian Pacific R. W. Co., 3 Q. P. R. 161, reversed in *S.C.*, 20 Occ. N. 442, 3 Q. P. R. 316 394

Y.

Young v. Brassey, 1 Ch. D. 277, discussed in Lougheed v. Praed, 1 Terr. L. R. 253 158

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Young v. Tucker, 19 Occ. N. 213, 18 P. R. 449, dictum in, overruled in *S.C.*, 20 Occ. N. 29, 30 S. C. R. 185 21

Young v. Ward, 24 A. R. 147, distinguished in Doidge v. Mimms, 20 Occ. N. 90, 13 Man. L. R. 48 202

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THE CANADIAN LAW TIMES.

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ABANDONMENT.

See APPEAL, VI. 1—EXECUTION, II.—JUDGMENT, V. 1—MINES AND MINERALS, I. 9, 10—MUNICIPAL ELECTIONS, I. 1.

ABATEMENT.

See VENDOR AND PURCHASER, 5.

ABSCONDING DEBTOR.

1. Attachment—*Insufficient affidavit—Waiver—Appearance—Bond.*]—An application to set aside an attachment. The affidavit simply alleged "that the said defendant company are absent or absconding from the Province of Nova Scotia." *Held*, that it should have contained statements bringing the defendants within Order 47, Rule 1 or Rule 6.

The defendants appeared to the action, and gave a bond to relieve the property under Order 46, Rule 20. *Held*, that that Rule would apply if the case had been brought within Order 47, Rule 6.

There was no waiver by appearing and putting in this bond. A party must not, after an irregularity committed by his opponent, take a step or do anything which will lead his opponent to suppose that no advantage will be taken of the irregularity, and to proceed to incur expense on that supposition. The bond was given under the pressure of the plaintiff's irregular process, and giving a bond is provided for by the Rule in all cases. To require a person to remain in prison until an order to hold to bail is set aside for irregularity is not the practice, and where property is seized the rule should be the same. The person has no feasible alternative, owing to the plaintiff's action. *Matthews* v. *Metropolitan Contracting Co.*, 20 Occ. N. 354.

2. Attachment—*Motion to set aside—Absence from Province—Costs.*]—The defendant had gone to work as a servant in the State of Maine, leaving his family in Nova Scotia. A writ of attachment was issued against him as an absent or absconding debtor. Upon a motion to set it aside, he swore that he had "before been employed in the same business and in the same place," but he did not say when or how long, or that to go there at a certain season and return at another was his well-known and regular course of business. Not long before leaving he had given a note to the plaintiffs and gone away without making any provision for it, and never communicated with the plaintiffs about it down to the time of the attachment. *Held*, that the motion should be dismissed, but, as an appearance had been entered, costs should abide the event. *Shafner* v. *Bailey*, 20 Occ. N. 459.

See ARREST, II. 1.

ACCELERATION.

See LANDLORD AND TENANT, IV. 1.

ACCIDENT INSURANCE.

See INSURANCE, I.

ACCOUNT.

1. Action for — *Previous demand — Costs.*]—Every action supposes a right

in the plaintiff and the violation of that right by the defendant. In order that a man who has a right to an account from another shall have an action *en reddition de compte* against him, it is necessary for him to shew a demand refused by the defendant; and if he sues without having made a demand, and the defendant, when sued, produces his account, the action will be dismissed with costs as premature. *Chanteloup* v. *Fulton*, Q. R. 16 S. C. 387.

2. Re-opening — *Delay—Contract.*]—Where accounts (for electric lighting) had been rendered by the plaintiffs during a period of over fourteen months, during which time the defendants would have had at least two opportunities to abandon the contract rather than pay increased rates for the future: *Held*, that the plaintiffs were not entitled to reopen the accounts on the ground that a wrong principle had been followed by them, in calculating the meter readings. *Royal Electric Co.* v. *Davis*, Q. R. 16 S. C. 377.

See ADMINISTRATION, 1 — DISCOVERY, I. 1—PARTNERSHIP, II. 1. 2—REFERENCE—TENANT FOR LIFE — WRIT OF SUMMONS, III. 1.

ACQUIESCENCE.

See APPEAL, XVI. 1—AUCTION—BANKRUPTCY AND INSOLVENCY, I. 2—CONSTITUTIONAL LAW, 9—EVIDENCE, II. 1 — MUNICIPAL CORPORATIONS, XII. — SALE OF GOODS, VIII. 3—WAY, II. 1.

ACTION.

1. Discontinuance — *Dismissal — Costs.*]—Article 278, C. C. P., which says that a party who has discontinued cannot begin again before paying the costs of the opposite party in respect of the abandoned demand or proceeding, does not apply to a case where the first suit has been dismissed. In this case the first suit was intended to be against the present defendant, and service upon him was made, but the plaintiff made a mistake as to his name. *Girard* v. *Brais*, Q. R. 16 S. C. 409.

2. Discontinuance — *Leave — "Proceeding in action"—Receiver—Order for—Irregularity.*] — Where defendants were added by order of Court and appeared and pleaded:—

Held, that plaintiffs had not the right, except by leave of the Court or a Judge, to discontinue as against such defendants, especially where defendants claimed a specific right in the property in question, which right would be affected by the action.

Where an agreement had been entered into under which defendants' solicitor was permitted to withdraw the defence pleaded by him and to prepare and deliver a new defence:—

Held, that this was "another proceeding in the action" after delivery of the defence, which, under O. 26, R. 1, precluded plaintiffs from discontinuing without leave of the Court or a Judge.

Held, also, that an order for the appointment of a receiver, made while the first defence was on the record, and which had not been abandoned, and of which neither the defendant F., nor his solicitor, had notice, was irregularly made and must be set aside with costs. *Boak* v. *Higgins*, 32 N. S. Reps. 494.

3. Dismissal — *Chambers — Entry for trial.*]—A Judge sitting in Chambers has power to dismiss an action for want of prosecution notwithstanding that the action has been entered for trial. *Sullivan* v. *Jackson*, 7 Brit. Col. L. R. 133.

4. Form of—*Exception to — Delay in presentation—Dismissal—Notice of motion.*] —The plaintiff sued the defendant in the Circuit Court for the sum of $15, the value of a sheep strangled by the defendant's dog. The defendant answered by an exception to the form, alleging that he ought to have been first brought *en conciliation*. Regular notice of the deposit and of the day of presentation of the motion was given to the plaintiff. On the day fixed the defendant did not bring on his motion, and several days afterwards he gave a new notice of its presentation. *Held*, that the motion should have been presented on the day fixed in the first notice, and that the delay in presentation was a sufficient ground for its rejection. *Noel* v. *Garneau*, Q. R. 17 S. C. 346.

5. Form of—*Personnelle-hypothecaire—Demurrer — Prolixity.*] — An action to recover a sum of money and to have it declared a charge on land and to have such charge enforced by sale will lie. Although the Code of Procedure does not expressly sanction such an action (personnelle-hypothecaire), there is nothing in it opposed thereto, and it is warranted by the constant, immemorial practice in this country. A demurrer will not be struck out because it is extraordinarily long and in the form of a factum. *Belgarde* v. *Carrier*, 3 Q. P. R. 238.

See CROWN, II. 1—PAUPER—REGISTRY LAWS, IV.—RES JUDICATA—SEDUCTION—STAY OF PROCEEDINGS—STREET RAILWAYS, I. 1.

ADJOURNMENT.

See PROHIBITION, III. 1.

ADMINISTRATION.

1. Account — *Succession — Partition —Conversion of estate into money.*]—Although, in general, the respective rights of the persons interested in a succession are to be determined by an action *en partage*, yet when such succession consists entirely of money, which has been administered by one of the heirs, the action to account lies without action *en partage*. 2. If it is alleged that the succession originally consisted in part of movables other than money, but that the same were converted into money, *preuve avant faire droit* will be ordered. *Brien* v. *Lanctot*, 2 Q. P. R. 560.

2. Administration order — *Discretion to refuse.*]—There is now a discretion, under Rules 946 and 954, in dealing with applications for administration orders, and the Judge or officer is not obliged to grant a summary order unless it appears that some good result will follow.

Order refused where the widow of an intestate was clearly entitled to a fund which was the only matter in dispute. *In re Ryan*, 20 Occ. N. 426, 32 O. R. 224.

See COSTS, II.—DEVOLUTION OF ESTATES ACT, ONTARIO.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ADMIRALTY LAW.

See SHIP.

ADMISSIONS.

See ATTACHMENT OF DEBTS, II. 2 — BILLS OF EXCHANGE AND PROMISSORY NOTES, 2—JUDGMENT, IV. 1, V. 7.

ADULTERY.

See HUSBAND AND WIFE, VIII. 1—PARTICULARS, I. 3, II. 1

ADVANCEMENT.

See WILL, I. 9.

ADVERSE CLAIM.

See MINES AND MINERALS, I.

ADVOCATE.

See DEFAMATION, 5 — PROHIBITION, IV. 1.

AFFIDAVIT.

1. Cross-examination on.]—Motion for injunction. Counsel for the defendant objected to the plaintiff's affidavit being read, as he had served notice asking that the plaintiff be produced for cross-examination on his affidavit, but the plaintiff had objected to being cross-examined.

Held, that Rules 385 and 429, taken together, compel the production for cross-examination of a deponent on his affidavit, if required by the opposite party, before such affidavit can be used. *Russell* v. *Saunders*, 20 Occ. N. 251, 7 Brit. Col. L. R. 173.

2. Cross-examination on.] — Rules 385 and 429 taken together compel the production for cross-examination of a deponent on his affidavit if required by the opposite party before such affidavit can be used. *Westphalen* v. *Edmonds*, 7 Brit. Col. L. R. 175.

3. Filing—*Mistake — Effect of — Quo warranto — Exception à la forme.*] — An affidavit accompanying a petition for a writ of *quo warranto* is void if it is received by an unauthorized person—in this case a deputy-clerk of the Circuit Court —and renders the writ itself void; and the defendant may set up the invalidity by way of exception to the form. *Lavoie* v. *Jeffrey*, Q. R. 16 S. C. 363.

4. Jurat—*Commissioner.*]—Where the affidavit for an opposition was sworn before a person describing himself as "C.C.S.D. pour le district de Montréal," no such official being known to the Court or entitled by law to receive affidavits, the affidavit was held null, and the opposition, not being supported by affidavit as required by law, was dismissed. *Lachance* v. *Lachance*, Q. R. 17 S. C. 395.

5. Marksman — *Certificate of commissioner.*]—The affidavit on which a rule *nisi* for a *certiorari* was granted was made by a marksman. Objection was taken on shewing cause that the certificate of the commissioner before whom the affidavit was sworn was not a compliance with Rule 1 of Hilary Term 11 V., in that the word "fully" was used

instead of "perfectly" in the clause "who seemed perfectly to understand same." *Held*, a sufficient compliance with the Rule. *Ex p. Allain*, 20 Occ. N. 87.

See ABSCONDING DEBTOR, 1—ARREST, I., III. 1, 2—ATTACHMENT OF GOODS, 1—BANKRUPTCY AND INSOLVENCY, I. 4, III. 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, II. — CERTIORARI, 6—COSTS, VII. 1—DISAVOWAL — DISCOVERY, IV.—EVIDENCE, VI. 1, 3—EXECUTION, III. 5 — FRAUDULENT CONVEYANCE, 2 — HUSBAND AND WIFE, V. 2—MINES AND MINERALS, I. 1—MOTION, I. 2—MUNICIPAL ELECTIONS, 1, 12—OPPOSITION, 1, 2—PLEADING, II. 2—WRIT OF SUMMONS, IV. 1, 3.

AGREEMENT.

See CONTRACT.

AGREEMENT FOR LEASE.

See LANDLORD AND TENANT, III.

AGRICULTURAL SOCIETY.

See COMPANY, III. 2.

AIDING DESERTER.

See CRIMINAL LAW, VII. 1.

ALDERMAN.

See MUNICIPAL ELECTIONS, II. 1.

ALIEN.

See MUNICIPAL ELECTIONS, II. 2.

ALIMENTARY DEBTS AND ALLOWANCES.

See ATTACHMENT OF DEBTS, I. 1, 10—HUSBAND AND WIFE, II. — JUDGMENT, III. 1, 4.

ALIMONY.

See HUSBAND AND WIFE, III., VIII. 4, 5—JUDGMENT, II. 3.

AMENDMENT.

Character of defendant—*Executor—Costs.*]—A plaintiff was allowed to amend the writ of summons and declaration in an action against a legatee, who was also the executor of the will of the original debtor, by charging the defendant as executor as well as personally, his character of executor being already alleged in the declaration. The amendment was allowed on payment to the defendant of the costs of the motion; the additional costs which might result from the amendment being reserved to be disposed of with the merits. *Longpré* v. *Brien*, 2 Q. P. R. 446.

See CRIMINAL LAW, VI. 3, VII. 8, IX. 1, 5, 7—CROWN, III. 1—DEFAMATION, 2—EVIDENCE, VII. 2—FRAUDULENT CONVEYANCE, 4—INJUNCTION, 4—JUSTICE OF THE PEACE, 1—MUNICIPAL CORPORATIONS, VI. 1, 2, VIII. 5, 6—OPPOSITION, 2—PARLIAMENTARY ELECTIONS, II. 3—PARTICULARS, I. 6—PARTNERSHIP, III. 2, IV. 2—PLEADING, II. 2, IV., VIII. 1—PROHIBITION, II. 3—WAY, IV. 4—WRIT OF SUMMONS, I., IV. 4.

ANIMALS.

See PARTICULARS, II. 4 — RAILWAYS AND RAILWAY COMPANIES, VI.

ANNUITY.

Agreement — *Charge on land — Registration—Notice.*]—The testator by his will directed his executor to pay his widow an annuity for the support and maintenance of one of his sons until he became of age; but, if there were not sufficient funds therefor, it was to be a charge on separate parcels of land severally devised to three of his other sons. There were sufficient funds in the executors' hands for the payment of this annuity, but by an agreement, for valuable consideration, made between the widow and the said devisees of the lands, it was agreed that the annuity should not be paid out of such moneys but should be a charge upon such lands, the intention being that such moneys should be kept in hand for the payment of a legacy to be paid to the first named son on his attaining his majority. A sale was subsequently made by one of the sons of the parcel of land devised to him. The purchaser, being informed as to an agreement having been entered into, but being at the same time told that it in no way affected the land, but merely created a personal obligation to pay the annuity, made no further inquiry with regard to it.

Held, that the purchaser could not be deemed to have purchased the land with notice of the contents of the agreement so as to be affected thereby.

Notice at law under the Registry Act discussed. *Coolidge* v. *Nelson*, 20 Occ. N. 225, 31 O. R. 646.

See CONSTITUTIONAL LAW, 8—COURTS. VII. 4—LIMITATION OF ACTIONS, 1—WILL,, I. 1, 10, II. 1.

APPEAL.

I. BRITISH COLUMBIA — APPEAL TO SUPREME COURT.
II. MANITOBA — APPEAL TO COURT OF QUEEN'S BENCH.
III. NORTH-WEST TERRITORIES.
IV. NOVA SCOTIA.
V. ONTARIO—APPEAL TO COURT OF APPEAL.
VI. ONTARIO — APPEAL TO HIGH COURT OF JUSTICE.
VII. ONTARIO—APPEAL TO SESSIONS.
VIII. QUEBEC — APPEAL TO CIRCUIT COURT.
IX. QUEBEC—APPEAL TO COURT OF QUEEN'S BENCH.
X. QUEBEC — APPEAL TO SUPERIOR COURT (IN REVIEW.)
XI. QUEBEC — APPEAL TO SUPERIOR COURT (SINGLE JUDGE).
XII. SUPREME COURT OF CANADA—JURISDICTION — (APPEAL FROM INTER-PROVINCIAL AWARD).
XIII. SUPREME COURT OF CANADA—JURISDICTION (ONTARIO CASES).
XIV. SUPREME COURT OF CANADA—JURISDICTION (QUEBEC CASES).
XV. SUPREME COURT OF CANADA—SECURITY FOR COSTS.
XVI. SUPREME COURT OF CANADA—OTHER CASES.

See ASSESSMENT AND TAXES, I. 2, III. 1, VI. 1, VII. 2—CERTIORARI, 3—INFANT, II. 1—PRIVY COUNCIL—JUDICIAL COMMITTEE.

I. BRITISH COLUMBIA—APPEAL TO SUPREME COURT.

1. Preliminary objection—*Failure to set down.*]—Failure to set down an appeal is an irregularity only, within s. 83 of the Supreme Court Act.

No preliminary objection will be heard unless proper notice has been given under the same section. *Baker* v. *Kilpatrick*, 7 Brit. Col. L. R. 127.

2. Preliminary objection *Mistake in appeal book.*]—An objection to the hearing of an appeal on the ground that the appeal books are defective and erroneous is not a preliminary objection within s. 83 of the Supreme Court Act. *Rogers* v. *Reed*, 20 Occ. N. 219, 7 Brit. Col. L. R. 139.

3. Right of appeal—*Election to take judgment in lieu of issue—Effect of.*]—The plaintiffs' counsel, on motion for judgment after trial, was given the option of having an issue ordered as to a point on which evidence was not sufficiently directed, or of taking judgment against one defendant with costs and dismissing the action against the other defendant without costs, and elected to take the latter course.

Held, that such judgment was in effect a compromise and therefore unappealable. *Sun Life Assurance Co.* v. *Elliott*, 7 Brit. Col. L. R. 189.

4. Right of appeal — *Special Commissioner—County Judge—Consent.*]—The Special Commissioner appointed under the Bennett-Atlin Commission Act, 1899, cannot confer the right of appeal to the parties to a dispute tried before him by purporting to sit as a County Court Judge. *Johnson* v. *Miller*, 7 Brit. Col. L. R. 46.

5. Time — *Commencement of.*] — The time for bringing an appeal from a trial judgment runs from the date of signing, entry, or perfection thereof, as the case may be, and not from the date of pronouncement.

International Financial Society v. *City of Moscow Gas Co.*, 7 Ch. D. 241, discussed. *Short* v. *Federation Brand Salmon Canning Co.*, 7 Brit. Col. L. R. 35.

6. Time — *Depositing appeal books — Extension — Application — Forum.*]—Appeal books were not deposited in time, and, on an application to extend the time, the full Court was asked to express an opinion whether such applications should be made in Chambers or to the full Court.

Held, that application should be made as soon as possible and to a Judge in Chambers, if the full Court is not sitting at the time. If the full Court is sitting at the time, the better course is to apply there in the first instance.

The application was allowed and the case set at the foot of the list. *Haley* v. *McLaren*, 20 Occ. N. 267, 7 Brit. Col. L. R. 184.

7. Time—*Notice — Service — Filing.*]—Under s. 79 of the Supreme Court Act, the provision as to the fourteen clear days applies to the service and not to the filing of the notice of appeal.

Archibald v. *McDonald*, 7 Brit. Col. L. R. 125.

See COSTS, IV. 4.

II. MANITOBA — APPEAL TO COURT OF QUEEN'S BENCH.

1. From judgment of County Court — *Order to amend—Finality.*]—An order of a County Court Judge at the trial of an action giving the plaintiff leave to amend his particulars of claim pursuant to s. 330 of the County Courts Act, R. S. M. c. 33, and providing that the defendant should have 15 days to put in a dispute note, and that in default judgment might be signed for the plaintiff for the full amount claimed, is a final order or judgment from which an appeal lies to the Court of Queen's Bench, under s. 315, as amended by 59 V. c. 3, s. 2. *Brenchley* v. *McLeod*, 20 Occ. N. 21, 12 Man. L. R. 647.

2. From judgment of Stipendiary Magistrate, N. W. T. — *Irregularity — Value of subject-matter.*] — An objection on the ground of irregularity in the proceedings leading up to an appeal cannot be taken on the argument of the appeal.

In determining the value of the subject-matter in dispute, upon which the right of appeal is made to depend, the proper course is to look at the judgment as to the extent that it affects the interest of the party prejudiced by it, and seeking to relieve himself from it by appeal.

In an action attacking a conveyance as fraudulent against creditors, the evidence shewing that there was an actual sale from the debtor to the claimant, and that even if there was any fraudulent intent on the part of the former, the latter bought *bona fide*, the conveyance was held valid. *Steele* v. *Ramsay*, 1 Terr. L. R. 1.

3. From judgment of trial Judge —*Question of fact—Reversal.*]—Under the Manitoba Queen's Bench Act, 1895, s. 48, and Rules 638, 640, the full Court *in banco* is a court of appeal from the decision of a Judge on questions of fact as well as of law, and must weigh conflicting evidence and draw its own inferences and conclusions, making due allowance for the circumstance that it has not seen or heard the witnesses. *The Glannibanta*, 1 P. D. at p. 287; *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; *Smith* v. *Chadwick*, 9 App. Cas. 187; *North British and Mercantile Ins. Co.* v. *Tourville*, 25 S. C. R. 177, followed. In this case the finding of the trial Judge was reversed by a Court of three Judges, one of whom dissented. *Creighton* v. *Pacific Coast Lumber Co.*, 19 Occ. N. 285, 12 Man. L. R. 546.

See CRIMINAL LAW, VIII. 1.

III. NORTH-WEST TERRITORIES.

See II. 2.

See also CRIMINAL LAW, VII. 10, IX. 2, 3.

IV. NOVA SCOTIA — APPEAL TO SUPREME COURT.

Questions of fact.]—The Court has power to review the findings of the trial Judge on questions of fact. *McInnes* v. *Ferguson*, 32 N. S. Reps. 516, followed. *McCurdy* v. *Grant*, 32 N. S. Reps. 520.

See TRIAL, VI. 2.

V. ONTARIO — APPEAL TO COURT OF APPEAL.

1. Constitutional law — *Justice of the peace—Stated case.*]—A case can be stated by a justice of the peace under R. S. O. c. 91, s. 5, for the judgment of the Court of Appeal, only when the constitutional validity of the statute in question is involved, and not when the decision depends merely upon whether the statute is or is not applicable to the defendants.

It was held, therefore, that an appeal would not lie from the decision of the police magistrate for the city of Toronto that the Toronto Railway Company were bound by a by-law of the city corporation, passed under the authority of the Municipal Act, directing them to put vestibules on their cars, the company contending that the by-law and the Municipal Act did not apply because their line crossed the lines of Dominion railways, thus making their undertaking a work for the general advantage of Canada and subject only to Dominion regulations. *Regina* v. *Toronto R. W. Co.*, 19 Occ. N. 386, 26 A. R. 491.

2. Leave to appeal—*Grounds—Municipal by-law.*]—Where a motion to quash a municipal by-law was refused by the Judge who heard it, and his order affirmed by a Divisional Court, an application for leave for a further appeal was dismissed.

Held, that, under s. 77 of the Judicature Act, upon such an application for

leave, it must appear that there is some reasonable ground for doubting the soundness of the judgment, and in addition thereto that special reasons exist for taking a case out of the general rule which forbids more than one appeal to the same party. *In re Reddock and City of Toronto*, 20 Occ. N. 399, 19 P. R. 247.

3. Leave to appeal—*Grounds—Order setting aside judgment.*]—A Divisional Court of the High Court having set aside a judgment signed by the plaintiffs for default of defence in an action on a bond, upon two grounds, viz., (1) that a motion for judgment was necessary, and (2) that the statement of claim had never been legally served upon the defendants, the posting up thereof in the office not being service because of the omission to file an affidavit of service of the writ of summons before doing so:—

Held, that leave to appeal should not be granted unless the plaintiffs could make a plausible attack upon both grounds, for if only one were demolished, the other would support the judgment, and leave to appeal is not given merely to settle a point of practice the decision of which would not affect the judgment complained of.

And in this case the service of the statement of claim could not be supported, having regard to Rule 574, and it was in the discretion of the Court below to give effect to the objection to its regularity, notwithstanding the defendants' delay in moving against the judgment. *Appleby* v. *Turner*, 20 Occ. N. 253, 19 P. R. 175.

4. Leave to appeal—*Third party notice.*]—Leave to appeal from an order of a Divisional Court, *ante* 98, setting aside a third party notice, was refused by a Judge of the Court of Appeal in Chambers.

Held, that the Divisional Court had not placed a construction of general application upon the words "or any other relief over" in Rule 209, but had merely decided their bearing upon the facts of this case, which were of a nature not likely to be of common occurrence; there was nothing special in the case beyond the fact that a Divisional Court of three Judges had differed from the view of another Judge of the High Court and of a local Judge; and the amount involved was comparatively small.

Moreover, the decision of the Divisional Court did not deprive the defendants of the benefit of the alleged dealings with the proposed third parties as a defence to the plaintiffs' action, and if the defence should be successful there would be no occasion for seeking relief over.

Semble, that even if leave to appeal were granted, it would not be on technical grounds, but only on the construction of the Rule. *Windsor Fair Grounds and Driving Park Association* v. *Highland Park Club*, 20 Occ. N. 164, 19 P. R. 130.

5. Report of Drainage Referee.] See *Townships of Adelaide and Warwick* v. *Township of Metcalfe*, 20 Occ. N. 63, 27 A. R. 92.

See COSTS, III. 7—EVIDENCE, VII. 2.

VI. ONTARIO—APPEAL TO HIGH COURT OF JUSTICE.

1. Abandonment — *Reinstatement — Leave to appeal.*]—The defendants, after setting down an appeal for hearing by a Divisional Court, served notice abandoning it, and the case was struck out of the list. They afterwards moved to have it restored to the list.

Held, that if the motion could be treated as one for leave to appeal notwithstanding the lapse of time, it would be incumbent upon the applicants to shew that *prima facie* the judgment below was wrong; and there being no error apparent on the face of the judgment, and no specific error having been pointed out, such an application must be refused.

But, *semble*, the motion could not be so treated.

The judgment below found that the defendants were trespassers and directed a reference as to damages. When the appeal was abandoned the defendants thought the claim of the plaintiffs would be much smaller than it subsequently appeared to be; and on learning the size of the claim, the defendants wished to renew their appeal.

Held, no ground for interfering.

The defendants had not made out any case shewing that any injustice was likely to arise if they were not allowed to appeal, or that they were only asking for what was just. *Union Bank of Canada* v. *Rideau Lumber Co.*, 20 Occ. N. 96, 19 P. R. 106.

2. County Court appeal—*Costs only involved — Question of principle.*] — See *Grove* v. *Bender*, 20 Occ. N. 95.

3. County Court appeal—*Motion for new trial.*] — There is no appeal to a Divisional Court from a judgment of a County Court on a motion for a new trial made to that Court, in an action tried with a jury. *Brown* v. *Carpenter*,

27 O. R. 412, followed. *Irvine* v. *Sparks*, 20 Occ. N. 115, 31 O. R. 603.

4. County Court appeal — *Setting down—Time—Certificate — Jurisdiction.*]—*Held*, that until the Judge of a County Court has certified under his hand to the proper officer of the High Court, as provided by ss. 55 and 56 of R. S. O. c. 55, an appeal cannot be set down for hearing: *McCarron* v. *Metropolitan Life Ins. Co.*, 19 Occ. N. 230; *Gilmor* v. *McPhail*, 16 P. R. 151.

After the time limited by the statute for setting down has expired, there is no jurisdiction to hear the appeal.

If the Judge neglects or refuses to certify under the above-mentioned sections in time to enable the appellant to set down the appeal within the time limited by the statute, his certificate cannot be dispensed with, nor the time enlarged for granting it.

The certifying in time to enable the appeal to be set down under these sections is a condition precedent to the jurisdiction of this Court to hear the appeal, and being such cannot be dispensed with. *Reekie* v. *McNeil*, 20 Occ. N. 73, 31 O. R. 444.

5. County Court Appeal — *Setting down — Time — Copies of pleadings.*]—A the hearing of an appeal from a County Court judgment, the plaintiff objected that the original pleadings were not certified by the Judge of the Court below, but only copies of them, and that the appeal was set down for too early a date, it having been set down for a sittings of a Divisional Court which began less than thirty days after the decision complained of: see s. 57 of the County Courts Act, R. S. O. c. 55; Rules 793, 795; and s. 55 of the Act.

Held, that it is the Rule, and not the statute, which requires the original pleadings to be certified, and the Court may and does dispense, in a proper case, with the fulfilment of the requirements of the Rules, or permits something to be done *nunc pro tunc*.

Held, also, that the provisions of s. 57 and Rule 795, as to setting down, were designed to prevent an appeal being unduly delayed, and are to be read as providing that the setting down is to be for a sittings not later than the first sittings after thirty days from the decision complained of. *Lees* v. *Ottawa and New York R. W. Co.*, 20 Occ. N. 75, 31 O. R. 567.

6. County Court appeal — *Setting down — Time — Judgment — Settlement.*]—The County Courts Act, R. S. O. c. 55, by s. 57 provides that "the appeal shall be set down for argument at the first sittings of a Divisional Court of the High Court of Justice which commences after the expiration of one month from the judgment, order, or decision complained of."

Held, that the month begins to run from the date of the judicial opinion or decision, oral or written, pronounced or delivered, and the judgment or order founded upon it must be referred to that date.

If such opinion or decision is not pronounced or delivered in open Court, it cannot be said to be pronounced or delivered until the parties are notified of it.

Quære, whether after a judgment has been settled and entered, the Judge has power to resettle it. *Fawkes* v. *Swayzie*, 20 Occ. N. 8, 31 O. R. 256.

7. Report of referee — *Reference of matters in dispute in an action — "In a summary way" — Solicitor's bill.*]—Proceedings in an action upon a solicitor's bill were stayed upon a certain agreement being entered into between the parties, whereby it was provided that evidence as to services rendered and disbursements made was to be given to a certain accountant named, and "in case of dispute as to services rendered or disbursements made, the matters disputed are to be referred in a summary way to F. E. Marcon, deputy clerk at Windsor, under R. S. O. c. 174, for decision."

Held, that by "a summary way," the parties meant that the reference was to be without ceremony or delay, the words "under R. S. O. c. 174" merely introducing the procedure under that Act (the Act respecting solicitors), but not to be construed as providing for an appeal from the report made by the deputy clerk upon such reference. *Sale* v. *Lake Erie and Detroit River R. W. Co.*, 20 Occ. N. 332, 32 O. R. 159.

See COSTS, III. 4, 8, IV. 3, VIII., IX. 7.

VII. ONTARIO—APPEAL TO SESSIONS.

Dismissal of complaint—*By-law.*]—There is no appeal to the Court of General Sessions of the Peace from an order of dismissal of a complaint made against the defendants for an offence against a city by-law passed under the authority of s. 551 of the Municipal Act, R. S. O. c. 223. *Regina* v. *Toronto Public School Board*, 20 Occ. N. 175, 31 O. R. 457.

See SESSIONS.

VIII. Quebec — Appeal to Circuit Court.

Municipal corporations — *Board of delegates — Service of writ — Costs.*]—An appeal lies to the Circuit Court, under Art. 1062, M. C., from any decision of a board of delegates, at the instance of any party aggrieved thereby, although the right to a petition, under Art. 100, M. C., is only granted to a municipal elector. — 2. The respective county corporations are sufficiently served with the writ of appeal by a service of the copy of the writ upon the secretary of the board of delegates.—3. The county corporations are liable for the costs of an appeal from a decision of their board of delegates acting on its own motion. *Village of Megantic* v. *County of Compton*, Q. R. 16 S. C. 281.

IX. Quebec — Appeal to Court of Queen's Bench.

1. From conviction — *Provincial offence — Criminal Code.*]—The offence of forcibly and unlawfully passing a turnpike gate without first having paid the legal toll, being an offence under a Provincial law, and concerning a matter under the exclusive authority of the Provincial Legislature, no appeal lies from a conviction by a magistrate to the Court of Queen's Bench, Crown Side, under Art. 879 of the Criminal Code, this article only applying to offences or matters over which the Parliament of Canada has legislative authority (Art. 840. Criminal Code). *Lecoms* v. *Hurtubise*, Q. R. 8 Q. B. 439.

2. From conviction — *Recorder's Court.*]—There is no right of appeal to the Court of Queen's Bench, Crown side, from a conviction by the Recorder's Court, Montreal, on a matter which is under the exclusive legislative authority of the Legislature of the Province of Quebec. Section 503 of the Montreal city charter, 62 V. c. 58, does not confer such right of appeal. *Superior* v. *City of Montreal*, Q. R. 9 Q. B. 138.

3. From conviction—*Summary trial.*]—There is no right of appeal to the Court of Queen's Bench, Crown side, on the merits of a case, from the decision of a Judge of the Sessions, or of any other magistrate or functionary mentioned in s. 782 (1) (*a*), Criminal Code, when he has acted under the jurisdiction conferred upon him for the summary trial of certain specified indictable offences; but in the case mentioned in the amendment passed in 1895 (58 & 59 V. c. 40) to s. 782 of the Criminal Code, viz., where the defendant is charged with any of the offences mentioned in s.-ss. (*a*) and (*f*) of s. 783, and where the offender is tried by two justices of the peace sitting together, there is an appeal from their conviction. *Regina* v. *Racine*, Q. R. 9 Q. B. 134.

4. From decision of Court of Revision.]—There is no appeal to the Court of Queen's Bench from a decision of the Court of Revision for the city of Montreal varying a report of the commissioners for the city in an expropriation matter. *Re City of Montreal and Grand Trunk R. W. Co.*, 3 Q. P. R. 208.

5. From interlocutory order in municipal election case — *Constitutional law—Provincial statute.*]—There is no appeal to the Court of Queen's Bench from an interlocutory judgment rendered in a contested municipal election case, under the charter of the city of Montreal, 62 V. c. 58 (Q.).—2. The legislative provision which prohibits such appeal is *intra vires* of a Provincial Legislature. *Clarke* v. *Jacques*, Q. R. 9 Q. B. 238.

6. From judgment of Court of Review—*Amount in controversy.*]—There is no appeal to the Court of Queen's Bench from a judgment of the Court of Review reversing that of the Court of first instance, in an action to obtain a release of a judgment for $45.20 with interest and costs, pronounced against the plaintiff in another case, and also to obtain a discharge of the lien resulting from the registration of such judgment. *Fortier* v. *Noel*, 3 Q. P. R. 294.

7. From order in Chambers—*Taxation of costs.*]—No appeal lies from the decision of a Judge in Chambers upon a petition to review the taxation of a bill of costs. *La Vallée and Richelieu R. W. Co.* v. *Menard*, 3 Q. P. R. 133.

8. Status of appellant—*Member of extinct corporation — Curator—Creditors—Divers judgments — Single appeal.*] — The appellant, in his capacity of member of an extinct corporation, duly called on to give his advice, and also as contesting the petition of the respondent, ought to be regarded as a party to the judgments appealed against, and as having an interest in causing them to be reversed.—2. The Judge who has been asked to name a curator to the effects of an extinct corporation can call together the creditors and persons interested without a special prayer to that

effect in the petition, seeing that such calling together is a preliminary measure necessary to the nomination of the curator; but proof of the allegations of the petition will be ordered *avant de faire droit* and before naming the curator.—3. Different judgment rendered in a cause, namely, the judgment naming the curator and interlocutory judgments, may be the subject of a single appeal. *Joynt* v. *Mulcair*, Q. R. 9 Q. B. 23.

See *Macdonald* v. *Thibaudeau*, Q. R. 8 Q. B. 449.

See also DAMAGES, 1—INJUNCTION, I. 2—MUNICIPAL ELECTIONS, I. 3—PARLIAMENTARY ELECTIONS, III. 2.

X. QUEBEC — APPEAL TO SUPERIOR COURT (IN REVIEW.)

1. Entry — *Notice — Time.*] — It is not necessary to serve the notice of entering a case for review within the time allowed for the entry; it is sufficient to serve it within a reasonable time after the entry. *Carter* v. *Reilly*, Q. R. 17 S. C. 129.

2. Entry — *Time—Certificate of prothonotary—Final judgment.*] — The entry of an appeal from the certificate of the prothonotary, under Art. 223, C. P., stating that an intervening party has not filed his intervention, with a certificate shewing its service, within three days from its reception, ought to be made, notified, and filed within eight days from the date of the certificate, which is equivalent to a final judgment upon the intervention. *Hillock* v. *Croizard*, 3 Q. P. R. 261.

3. From Circuit Court — *Future rights—Municipal corporations.*]—There is no appeal from the decision of the Circuit Court upon a petition, under Art. 100 of the Municipal Code, to quash a simple resolution which declares a road and bridge formerly local to be a county road and bridge, when it does not appear that the future rights of the petitioner are affected by it. *Guertin* v. *County of Laprairie*, Q. R. 16 S. C. 531.

4. From Circuit Court—*Mortgage—Builder's privilege—Vendor and purchaser.*] —A judgment of the Circuit Court in an action in recognition of a hypothec is appealable to the Court of Review. —2. The registration of a builder's privilege, for work done at the request of a person owning an immovable subject to a resolutory condition entitling the vendor to demand the dissolution of the sale by reason of failure to pay the price, ceases to have any effect after the vendor has taken back the property under the condition. *Latour* v. *L'Heureux*, Q. R. 16 S. C. 485.

5. From interlocutory judgment—*Dilatory exception — Municipal corporations.*]—A judgment dismissing an exception to the jurisdiction is interlocutory.—There is no appeal to the Court of Review from an interlocutory judgment, even in matters concerning municipal corporations and municipal offices. *Bédard* v. *Village of Delorimier*, Q. R. 17 S. C. 141.

6. From order of Judge—*Taxation of costs.*]—There is no appeal from the order of a Judge of the Superior Court taxing and ascertaining the costs of an arbitration by virtue of paragraph 20 of Art. 5164, R. S. O. *Valée Est du Richelieu R. W. Co.* v. *Jetté*, Q. R. 17 S. C. 493.

7. Incomplete record.] — When a case is inscribed in review, and the record from the Court below is found to be incomplete, the Court of Review, on motion, will order the same to be sent back and completed before hearing argument. *Whiting* v. *Menier*, Q. R. 16 S. C. 448.

8. Status of appellant—*Provisional guardian — Leave.*]—A provisional guardian has no right to appeal from a judgment dismissing a petition by him, without obtaining the leave of the Court or Judge; and the entry of the appeal without leave will be struck out with costs, on motion. *Dowker* v. *Lynn*, 3 Q. P. R. 260.

See EXECUTION, V.—JUSTICE OF THE PEACE, 3—MUNICIPAL ELECTIONS, I. 2.

XI. QUEBEC — APPEAL TO SUPERIOR COURT (SINGLE JUDGE).

Order in Chambers — *Guardian.*]—An appeal does not lie to the Superior Court (single Judge sitting at Montreal) from an order of a Judge at Chambers appointing a guardian and a person to watch the conduct of the guardian. *Bousquet* v. *Dauphinais*, 2 Q. P. R. 366.

XII. SUPREME COURT OF CANADA—JURISDICTION (APPEAL FROM INTER-PROVINCIAL AWARD).

Disputed question of law.]—In an award made under 54 & 55 V. c. 6, s. 6 (D.), 54 V. c. 2, s. 6 (O.), and 54 V. c. 4, s. 6 (Q.), there can be no appeal to the Supreme Court of Canada, unless the arbitrators in making the award set forth therein a statement that in rendering the award they have proceeded on their view of a disputed question

of law. *Province of Ontario* v. *Province of Quebec and Dominion of Canada—In re Common School Fund and Lands*, 30 S. C. R. 306.

XIII. Supreme Court of Canada—Jurisdiction (Ontario Cases).

1. Amount in dispute — *Statutes—Repugnancy.*]—Paragraph (*f*) of s. 1 of 60 V. c. 34 (D.), which provides that, where an appeal from the Court of Appeal for Ontario depends on the amount in dispute, such amount shall be understood to be that demanded, and not that recovered, if they are different, has no operation, being repugnant to (*c*), which requires the matter in controversy *on the appeal* to exceed $1,000 to give jurisdiction.

Where two clauses of the same statute, coming into force at the same time, are repugnant, the clause placed last in point of arrangement cannot be held to supersede the other as expressing the latest mind of the legislators. *Hunter* v. *City of Ottawa*, 20 Occ. N. 431.

2. County Court case—*Removal into High Court—Leave to appeal.*]—An action was begun in a County Court to recover damages for injury to land by water from drains. After issue joined the cause was removed into the High Court, a question as to the jurisdiction of the County Court having been raised. All subsequent proceedings were carried on in the High Court, and at the trial a reference was ordered to the Drainage Referee, who held that the plaintiffs had no cause of action. The Court of Appeal reversed this holding, and gave judgment for the plaintiffs: 26 A. R. 162, 19 Occ. N. 133.

Held, that the action was not originally brought in a Superior Court, as required by R. S. C. c. 135, ss. 24 (*a*) and 28, and there was no jurisdiction to hear the appeal; and it was therefore quashed.

Leave to appeal cannot be granted under 60 & 61 V. c. 34, s. 1 (*e*), in a case not appealable under R. S. C. c. 135.

Decision of Osler, J.A., allowing the appeal to the Supreme Court, 18 P. R. 449, 19 Occ. N. 213, overruled. *Young* v. *Tucker*, 20 Occ. N. 29, 30 S.C.R. 185.

3. Final judgment — *Ruling on evidence — Proceedings in Equity.*]—Where a referee, on a reference under the Vendor and Purchaser Act to settle the title under a written agreement for a lease, rules that evidence might be given to shew what covenants the lease should contain, an appeal does not lie to the Supreme Court of Canada from a judgment affirming such ruling, it not being a final judgment, and the case not coming within the provisions of s. 24 (*e*) of the Supreme and Exchequer Courts Act, relating to proceedings in equity: Gwynne, J., dissenting. *In re City of Toronto and Canadian Pacific R. W. Co.*, 20 Occ. N. 269, 30 S. C. R. 337.

4. Judgment of Divisional Court.] —*Held*, per Strong, C.J. and Gwynne, J., that under s. 26, s.-s. 3, of the Supreme and Exchequer Courts Act, leave to appeal direct from a judgment of a Divisional Court of the High Court of Justice for Ontario may be granted in cases where there is no right to appeal to the Court of Appeal.

Girouard, J., without expressing any opinion, concurred in dismissing an appeal from an order in Chambers granting leave to appeal. Taschereau and Sedgwick, JJ., contra. *Farquharson* v. *Imperial Oil Co.*, 19 Occ. N. 125, 372, 30 S. C. R. 188.

5. Title to land — *Duty — Future rights.*] — Proceedings to restrain the owner of land from constructing a ditch thereon under the Ditches and Watercourses Act to prevent injury to adjoining property, do not involve any question of title to land or any interest therein within the meaning of 60 & 61 V. c. 34, s. 1 (*a*), relating to appeals to the Supreme Court of Canada in Ontario cases. The fact that the adjoining land was to be taxed for benefit by construction of the ditch would not authorize an appeal under s.-s. (*d*), as relating to the taking of a duty or fee, nor as affecting future rights. *Waters* v. *Manigault*, 20 Occ. N. 222, 30 S. C. R. 304.

XIV. Supreme Court of Canada—Jurisdiction (Quebec Cases).

1. Amount in dispute.]—An action was brought by the lessee of lands, the rental of which was $250 per annum, to have the lease cancelled as being simulated.

Held, that no amount of $2,000 or upwards was in dispute, and the appeal not relating to any title to land or tenements or annual rents within the meaning of s. 29 (*b*) of R. S. C. c. 135, the Supreme Court had no jurisdiction to hear it. *Frechette* v. *Simoneau*, 20 Occ. N. 433.

2. Amount in dispute—*Pleas—Incidental issues.*]—Issues raised merely by pleas cannot have the effect of increasing the amount in controversy so as to

give the Supreme Court of Canada jurisdiction to hear an appeal; Girouard, J., dub. *Standard Life Assurance Co.* v. *Trudeau*, 20 Occ. N. 223, 30 S. C. R. 308.

3. Final judgment — *Plea of prescription—Costs.*]—A judgment affirming the dismissal of a plea of prescription, when other pleas remain on the record, is not a final judgment from which an appeal lies to the Supreme Court of Canada.

An objection to the jurisdiction of the Court should be taken at the earliest moment. If left until the case comes on for hearing and the appeal is quashed, the respondent may be allowed costs of a motion only.

Hamel v. *Hamel*, 26 S. C. R. 17, approved and followed. *Griffith* v. *Harwood*, 20 Occ. N. 270, 30 S. C. R. 315.

(See also *S. C.*, 2 Q. P. R. 505.)

4. Future rights—*Nullité de procès-verbal—Reservation of recourse.*]—An action *en nullité de procès-verbal* does not bring future rights in question in such a way as to allow an appeal to the Supreme Court of Canada. Questions of procedure should, except in special and extraordinary cases, be left to the Provincial Court. If a judgment dismisses an action *en nullité de procès-verbal*, for default of the plaintiff to prosecute it, but reserves the plaintiff's recourse, the prescription enacted by Art. 705, C. M., cannot be set up in answer to a subsequent action. *County of Nicolet* v. *Tousignant*, 3 Q. P. R. 257.

5. Matter in controversy—*Séparation de corps—Money demand.*]—In an action by a wife for *séparation de corps* for ill-treatment, the declaration prayed that the husband be condemned to deliver up to the wife her property, valued at $18,000. The judgment in the action decreed separation and ordered an account as to the property.

Held, that no appeal would lie to the Supreme Court from the decree for separation.

O'Dell v. *Gregory*, 24 S. C. R. 661, followed.

And the money demand in the declaration, being only incidental to the main cause of action, could not give the Court jurisdiction to entertain the appeal. *Talbot* v. *Guilmartin*, 20 Occ. N. 322.

6. Matter in controversy — *Tutorship.*]—The Supreme Court of Canada has no jurisdiction to entertain an appeal from a judgment pronounced in a controversy in respect to the cancellation of the appointment of a tutrix to minor children. *Noel* v. *Chevrefils*, 20 Occ. N. 272, 30 S. C. R. 327.

7. Title to land — *Future rights—Quashing.*]—An opposition to a writ of possession issued in execution of a judgment allowing a right of way over the opposant's land does not raise a question of title to land nor bind future rights, and in such a case the Supreme Court of Canada has no jurisdiction to entertain an appeal. If the jurisdiction of the Court is doubtful, the appeal must be quashed.

Langevin v. *Les Commissaires d'Ecole de St. Marc*, 18 S. C. R. 599; *O'Dell* v. *Gregory*, 24 S. C. R. 661; *Riou* v. *Riou*, 28 S. C. R. 53; *Chamberland* v. *Fortier*, 23 S. C. R. 371; *La Commune de Berthier* v. *Denis*, 27 S. C. R. 147; and *McGoey* v. *Leamy*, 27 S. C. R. 193, 545, discussed. *Cully* v. *Ferdais*, 20 Occ. N. 273, 30 S. C. R. 330.

8. Ultra vires—*Action for penalties—Plea.*]—The Association Pharmaceutique sued L. for $325, penalties for selling drugs without license. L. pleaded a general denial and that the Pharmacy Act was *ultra vires*. The action was dismissed below for want of proof of the illegal selling alleged.

Held, Strong, C.J., and Gwynne, J., dissenting, that if the Court should find error in the judgment appealed from, the question of *ultra vires* pleaded by L. would have to be dealt with, and the case was therefore appealable under s. 29 (*a*) of the Supreme Court Act, though no appeal would lie if this plea were not on the record. *Association Pharmaceutique* v. *Livernois*, 20 Occ. N. 322, 30 S. C. R. 400.

XV. Supreme Court of Canada — Security for Costs.

1. Bond—*Surety—Wife.*]—One of the sureties of the plaintiff's bond filed as security for the costs of an appeal to the Supreme Court of Canada was the wife of the plaintiff.

Held, that the bond was insufficient on that account, but that the time should be extended to enable the plaintiff to file another bond. *Messenger* v. *Town of Bridgetown*, 20 Occ. N. 409.

2. Several appellants.]—The respondents (defendants in the Superior Court) filed separate appearances in appeal, but, by mutual arrangement between them and the appellants, one factum only was filed by the latter, and one judgment rendered (dismissing the appeal). Upon the application for leave to appeal to the Supreme Court, the respondents urged that they were entitled to separate security for costs, from each of the four appellants, that is to say,

four bonds of $500 each. *Held*, that the appeal to the Supreme Court should be allowed upon security being furnished as for a single appeal, viz., to the extent of $500. *Archer & Severn*, 12 P. R. 472, followed. *Bonsack Machine Co.* v. *Falk*, Q. R. 9 Q. B. 355.

3. Stay of proceedings — *Payment of money out of Court.*]—At the trial the plaintiffs recovered judgment in the High Court against the defendants for damages and costs. The defendants appealed to the Court of Appeal, paying $200 into Court as security to the plaintiffs for the costs of such appeal. The appeal was dismissed with costs. The defendants launched a further appeal to the Supreme Court of Canada, and gave the security required by s. 46 of the Supreme and Exchequer Courts Act, but no other security.

Held, that proceedings to enforce the plaintiffs' judgment in the High Court were not stayed, either by force of s. 48 or otherwise.

But the Court was not bound to pay out immediately to the plaintiffs the sum of $200 paid in by the defendants, the judgment of the Court of Appeal being stayed pending the appeal to the Supreme Court, which might determine that the plaintiffs were not entitled to the costs of the Court of Appeal.

And in this case the money ought not to be paid to the plaintiffs, from whom it could never be recovered, and whose solicitors declined to take it upon the usual undertaking, but should remain in Court during the pending appeal. *Rombough* v. *Balch*, 20 Occ. N. 106, 19 P. R. 123.

XVI. Supreme Court of Canada — Other Cases.

1. Acquiescence — *Estoppel — Appeal for costs — Quashing.*]—The defendants severally contested a demand for judicial abandonment, on the ground that they were not partners. The judgments appealed from declared them to be partners. They then abandoned their property under reserve of exception taken to the judgments and of their recourse by appeal to the Supreme Court of Canada, and declared that the abandonment was consented to under these reserves and in order to avoid a *capias*, penalties, trouble, and costs. After a curator had been appointed, and while the estate was being realized and distributed, they commenced proceedings for appeals to the Supreme Court of Canada. On motions to quash the appeals:—

Held, Sedgewick, J., *dubitante*, that the abandonment made was an *acquiescement* and voluntary execution of the judgments in question, and estopped the defendants from further appeal, except on the question of costs. Upon that question the Court had jurisdiction to entertain an appeal, but uniformly declined to do so. In such cases the proper practice is to move to quash the appeal. *Schlomann* v. *Dowker*, 20 Occ. N. 271, 30 S. C. R. 323.

2. Interference — *Question of procedure.*]—See *McFarren* v. *Montreal Park and Island R. W. Co.*, 20 Occ. N. 323, 373, 30 S. C. R. 410.

3. Objection first taken on appeal.]—See *Regina* v. *Poirier*, 19 Occ N. 378, 30 S. C. R. 36.

4. Questions of fact.]—Where there does not appear to have been manifest error in the findings of the Courts below, they will not be disturbed on appeal. Judgment of the Court of Queen's Bench for Lower Canada (Q. R. 9 Q. B. 18) reversing the judgment of the Court of Review and restoring that of the Superior Court, affirmed. *Paradis* v. *Limoilu*, 30 S. C. R. 405.

See also *Quebec Fire Insurance Co.* v. *Bank of Toronto*, 20 Occ. N. 222.

See Costs, IV. 5, 11.

APPEARANCE.

See Absconding Debtor, 1—Husband and Wife, I. 2, 4—Judgment, I. 4—Parties, II. 1—Writ of Summons, II. 1, V. 3.

APPORTIONMENT.

See Way, II. 1.

APPRENTICE.

See Master and Servant, I.

AQUEDUCT.

See Mortgage, IV. 2.

ARBITRATION AND AWARD.

See Appeal, XII. — Costs, VII. 7—Courts, VI. 2, VII. 3—Crown, IV. 2—Landlord and Tenant, VI. 1—Municipal Corporations, II., XVI. 1—Railways and Railway Companies, V. 1, 2—Schools, 1—Water and Watercourses, I. 1, II. 3.

ARREST.

I. In British Columbia.

II. In Ontario.

III. In Quebec.

See Bankruptcy and Insolvency, III. 5—Canada Temperance Act — Husband and Wife, IV.—Judgment, II. 4.—Trial, IX.

I. In British Columbia.

Capias—*Affidavit—Sufficiency — Intent—Irregularity — Waiver — Bail.*] — Statements in affidavit as to debt and intention to leave considered.

A defendant arrested under a writ of *ca. re.* admits by implication his intention to leave the Province by denying his intention to leave it permanently.

By the giving of bail, a defendant so arrested waives his right to object to irregularities in the writ. *Robertson* v. *Beers*, 7 Brit. Col. L. R. 76.

II. In Ontario.

1. Application for discharge — *Onus—Intent to defraud—Former absconding.*]—Upon an application by the defendant for his discharge from arrest under a *ca. re.*, he did not dispute the existence of the debt, nor that he was about to leave the country without paying or providing for it, but contended that he was not about to quit the Province with intent to defraud.

The debt sued for was contracted in 1893, and arose out of a scheme, in which the plaintiff was induced by the defendant to purchase an interest. It was alleged, but disputed, that this was a fraudulent scheme. It was also alleged and denied that the defendant in 1893 absconded from this Province to the United States of America. The defendant was a citizen of the Upited States, and was in Ontario in 1893, and again in 1900, when arrested, for temporary business purposes. It was not shewn that he ever had any property in this Province, nor that he took any away with him in 1893, nor that at the time of his arrest he had any in his hands or under his control. The evidence did not shew that he was at the time of the arrest about to leave the Province hurriedly, but that he intended to stay till he had finished the business which brought him to the Province, and then return to his own country as of course.

Held, Ferguson, J., dissenting, that the Court could not, upon this application, try the question whether the defendant did or did not abscond in 1893; that the onus was upon the plaintiff to make out the fraudulent intent in the departure now proposed, by more than mere suspicion; and that, upon all the facts and merits disclosed, the arrest could not be maintained. *Kerstermas* v. *McLellan*, 10 P. R. 122, distinguished. *Beam* v. *Beatty*, 20 Occ. N. 305, 19 P. R. 207.

2. Intent to quit Ontario — *Creditors.*]—It is not sufficient for a creditor applying for an order for arrest under R. S. O. c. 80, s. 1, to shew the existence of a debt and that the debtor is about to quit Ontario; he must shew some other fact or circumstance which, coupled with those facts, points to an intent to defraud.

Shaw v. *McKenzie*, 6, S. C. R. 181, *Toothe* v. *Frederick*, 14 P. R. 287, and the opinions of Burton and Maclennan, JJ.A., in *Coffey* v. *Scane*, 22 A. R. 269, followed.

The opinions of Hagarty, C.J.O., and Osler, J.A., in *Coffey* v. *Scane*, and the case of *Robertson* v. *Coulton*, 9 P. R. 16, dissented from.

McVeain v. *Ridler*, 17 P. R. 353, discussed.

Whether or not there is good and probable cause for believing that the intent to defraud exists, is a question of fact.

And where the defendant believed that his wife had no claim against him for alimony:—

Held, that he could not be intending to defraud her by leaving Ontario. *Phair* v. *Phair*, 20 Occ. N. 34, 19 P. R. 67.

III. In Quebec.

1. Affidavit.] — The affidavit upon which a *capias* is founded must indicate the place where the debt was contracted, and in the absence of such indication the *capias* will be quashed on petition. *Sheridan* v. *Pingree*, Q. R. 17 S. C. 310.

2. Affidavit—*Information—Source.*]—A *capias* issued upon the affidavit of the plaintiff alleging the approaching departure of the defendant and the sale of his effects, based upon information given to him, the plaintiff, by a person worthy of credit, will be quashed on petition, if the plaintiff does not indicate the name of the person who has given him such information. *Lemieux* v. *Bussière*, 3 Q. P. R. 318.

3. Assignment for creditors—*Discharge—Schedule—Contestation — Time.*]—A debtor imprisoned under civil process, who makes an assignment of his property, is not prevented from demanding

his discharge, for default of contestation of his schedule within four months after its filing, by the fact that the plaintiff who has caused the imprisonment, having been named provisional guardian in respect of the assignment, has neglected to give notice of his appointment and to procure the nomination of a curator, and that in spite of the fact that the time for contestation of the schedule begins to run regularly only after notice of the appointment of the curator. However, in this case, the Court granted to the plaintiff a delay of eight days to contest the schedule, ordering the discharge of the debtor if the contestation were not filed within that time. *Bury* v. *Lynch*, Q. R. 17 S. C. 166, 2 Q. P. R. 419.

4. Capias—*Validity—Motion after payment.*]—A defendant who, being arrested under a writ of *capias*, pays the debt and costs in full to avoid detention, cannot, by motion, demand the return of the writ and proceedings thereon, to discuss the validity of the *capias* or of the plaintiff's claim: his only recourse is by action to recover back the money paid or in damages. *Leduc* v. *Martel*, 2 Q. P. R. 556.

5. Cause of action—*Damages for personal injuries.*] — The words "personal injuries" in Art. 833 (4), C. P., have the same meaning as "personal wrongs" in s. 15 of 12 V. c. 42 (C.), and in R. S. L. C. 1861 c. 87, s. 24. Anything done in violation of the rights of any one in respect of his person is a personal wrong. So, there is ground for arresting for debt the person who causes a bicycle accident for the damages which he has been adjudged to pay to the person injured. *Chouinard* v. *Raymond*, 3 Q. P. R. 184.

6. Cause of action—*Promissory note—Judgment — Belief — Concealment.*]—The plaintiff who alleges, in an affidavit for a *capias*, that the defendant is personally indebted to him in a sum greater than $50, for the amount of a promissory note, of which he gives the date and the place of making, and of a judgment rendered upon such note requiring the defendant to pay him the amount of it, is not obliged to say where the judgment was rendered, the note being the cause of action.—2. The deponent is not obliged to state where the defendant has hidden and withdrawn his effects, if he alleges that the concealment and withdrawal were made with the intention of defrauding him.—3. Nor to give his reasons for swearing that the defendant has withdrawn and hidden his effects, if he swears positively that the concealment and withdrawal have taken place.—4. Nor to state in what manner the withdrawal and concealment have taken place. *Lussier* v. *Vincent*, 3 Q. P. R. 98.

7. Costs — *Fraudulent scheme.*]—The fact of claiming the costs due to the attorney does not render a *capias* void if the demand includes, besides, a personal debt of more than $50 due to the plaintiff.—2. The attempt of the defendant to conceal his earnings from his creditors by having his partner as a permanent creditor, is not a ground for a *capias*. *Le Comptoir d'Escompte* v. *Decelles*, 3 Q. P. R. 130.

8. Debtor in close custody—*Allowance to—Judgment for—Necessity for service.*]—It is not necessary to serve a judgment (under Art. 843, C. P.) requiring the plaintiff to pay an allowance for maintenance to the defendant whom he detains in gaol, by virtue of a *capias*; and, if the plaintiff does not pay such allowance in the time fixed by the judgment which he says he does not know of, the defendant will be discharged upon petition, under Art. 846.—Parties are considered to be present in Court when judgment is rendered upon a demand, however served, and they are held, as a general rule, to have knowledge of it without service. *Tessier* v. *Tessier*, 3 Q. P. R. 93.

9. Discharge—*Assignment—Time—Contestation of schedule — Assets — Tavern license.*]—A debtor arrested on *capias* cannot be released, upon making an assignment of his effects, until after the expiration of the four months allowed for contesting his schedule.—2. In this case the period of four months began to run on the day on which notice of the assignment was given to the creditors of the insolvent.—3. A tavern license is part of the assets of the debtor, who should assign it as well as other goods. *Pagnuelo* v. *Bastien*, 2 Q. P. R. 455.

10. Indeterminate imprisonment—*Provincial statute — Intra vires — Execution—Fixed period—Interest of debtor.*]—The provision contained in Art. 925, C. P. C., which permits the Court to condemn a debtor who has been released on bail, to an indeterminate imprisonment, is constitutional.—The imprisonment mentioned in Art. 925, C. P. C., is neither a penalty nor a punishment, but simply a means of execution to force the debtor to give up property which he is detaining to the prejudice of his creditors. — The condemnation of the debtor to an imprisonment limited to eight months is not what the law seems to contemplate, but the debtor cannot complain of it, as it is in his case. *Quebec Bank* v. *Tozer*, Q. R. 17 S. C. 303.

ASSAULT.

See JUSTICE OF THE PEACE, 1.

ASSESSMENT AND TAXES.

I. ASSESSMENT ROLL.
II. DISTRESS FOR TAXES.
III. EXEMPTIONS.
IV. PRESCRIPTION.
V. PROPERTY ASSESSABLE.
VI. TAX SALE.
VII. OTHER CASES.

See COMPANY, II. 6—JUSTICE OF THE PEACE, 5—LANDLORD AND TENANT, III. — MUNICIPAL CORPORATIONS, X. 1 — VENDOR AND PURCHASER, 1.

I. ASSESSMENT ROLL.

1. Assessor — *Qualification — Nullity—Omission.*] — A person who is only a usufructuary is not eligible for the office of assessor for a municipality.—However, the fact that one of the assessors has not the necessary qualification is not alone sufficient to make the assessment roll void.—The assessment roll will not be annulled because the assessors have omitted to make in it a separate assessment of a piece of ground forming part of a lot estimated on the roll as a whole, especially when the omission has been made upon the demand of the owner of this piece of ground, and no complaint on this subject has been made at the time of the revision of the roll. *Sénécal* v. *Parish of L'Ile Bizard*, Q. R. 17 S. C. 268.

2. Quashing roll — *Appeal.*] — One may proceed by petition, by virtue of Art. 100, C. M., to demand the quashing of an assessment roll for illegalities making it void. However, where the complaint is only of the assessment of a part of the properties on the roll, the quashing of the whole roll cannot be asked; in such a case review by way of appeal under Art. 1061 is the remedy. *Sénécal* v. *Parish of L'Ile Bizard*, Q. R. 17 S. C. 267.

3. What it should shew — *Exemption.*]—The assessment roll for the town, following defendant's name, and under the heading "whole taxable property," contained the entry "$400."

Held, that it was not necessary to shew in the assessment roll that the property mentioned was defendant's taxable property over and above the exemption. *Town of Westville* v. *Munro*, 32 N. S. Reps. 511.

II. DISTRESS FOR TAXES.

1. Change of ownership — *Chattel mortgage — Purchase from mortgagee.*] — Goods purchased from the chattel mortgagee thereof are not "claimed * * * by purchase, gift, transfer, or assignment" from the mortgagor within the meaning of R. S. O. c. 224, s. 135, s.-s. 4 (*b*), so as to make them liable in the purchaser's hands to distress for taxes due by the mortgagor.

Judgment in 31 O. R. 301, 20 Occ. N. 11, affirmed. *Horsman* v. *City of Toronto*, 20 Occ. N. 349, 27 A. R. 475.

2. Ontario Assessment Act, R. S. O. 1887 c. 193, s. 135 — *Imperative or directory—Failure to distrain—Enforcing payment in subsequent year.*] — The provisions of s. 135 of the Ontario Assessment Act, R. S. O. 1887 s. 193, in respect to taxes on the roll being uncollectable, and what the account of the collector in regard to the same shall shew on delivery of the roll to the treasurer, and requiring the collector to furnish the clerk of the municipality with a copy of the account, are imperative.

Taxes on the roll not collected cannot be recovered by distress in a subsequent year, unless such arrears have accrued while the land in respect of which they were imposed was unoccupied.

Judgments in 26 A. R. 459, 19 Occ. N. 263, and 30 O. R. 16, 18 Occ. N. 402, affirmed. *Caston* v. *City of Toronto*, 20 Occ. N. 321, 30 S. C. R. 390.

III. EXEMPTIONS.

1. Action for taxes—*Defence—Assessment Appeal Court.*]—In an action to recover an amount for taxes, defendant disputed her liability on the ground that she was a widow and was exempt by law the sum of $400, and that such exemption had not been made.

Held, that it was not competent to defendant to raise this defence in an action for the taxes, but that it should have been raised and argued in the Court of Assessment Appeals. *Town of Westville* v. *Munro*, 32 N. S. Reps. 511.

2. "Public hospital."]—A hospital carried on by and for the benefit of two medical practitioners, and used chiefly by patients paying fees, though to some extent by indigent patients, and in receipt of a Government grant under the Charity Aid Act, R. S. O. c. 320, is a public hospital within the meaning of s.-s. 5 of s. 7 of the Assessment Act, R. S. O. c. 224, and exempt from taxation.

Judgment in 30 O. R. 116, 19 Occ. N. 34, affirmed. *Struthers* v. *Town of Sudbury*, 20 Occ. N. 202, 27 A. R. 217.

3. Railway lands—*Sale of—Authority to assess—School district.*]—Lands vested in the Canadian Pacific Railway Company subject to a provision that the same should "until they are sold or occupied, be free from taxation for 20 years," were by the company agreed to be sold and conveyed to the appellants as trustees, who were to sell them, accounting for an interest in the proceeds to the company. At the date of the assessment of the lands, the consideration owing by the trustees to the company had been paid.

Held, that the lands had ceased to be exempt from taxation.

Held, also, Wetmore and McGuire, JJ., *dissenting*, that, in view of the Ordinances relating to municipalities, and to schools, the lands being situated partly within and partly without the municipality, the school district was authorized to assess, and need not make a demand upon the municipality to do so. *Angus* v. *Calgary School Trustees*, 1 Terr. L. R. 111.

4. Railway lands—*School taxes—By-law — Validating statute.*]—In 1881 the plaintiffs passed a by-law, No. 148, providing for a bonus to the defendants in consideration of certain works to be undertaken by the defendants, and also providing that the defendants should be forever exempt from all "municipal taxes and rates, levies and assessments, of every nature and kind." In 1883 the Legislature of Manitoba passed an Act making valid by-law No. 148 of the city of Winnipeg, describing it as a by-law for a bonus, but omitting all reference to the exemption clause.

Held, affirming the judgment in 12 Man. L. R. 581, 19 Occ. N. 287, that the statute made valid the whole by-law 148, that relating to exemption from taxes, as well as the portion recited in the Act.

Held, also, reversing the judgment, that under the by-law school taxes were included in the exemption from "all municipal taxes." *City of Winnipeg* v. *Canadian Pacific R. W. Co.*, 20 Occ. N. 433.

See, also, V. 3.

IV. Prescription.

1. Special tax—*Interest.*]—In the case of municipal corporations subject to the general enactments concerning towns, arrears of taxes, even special taxes, are subject to a three years' prescription, and the same prescription operates against interest on such taxes. The prescription is interrupted when the ratepayer has asked and obtained an extension of time for payment, and does not begin to run, until the expiration of such extension. *Lapierre* v. *Renaud*, Q. R. 17 S. C. 273.

2. Special assessment for drain.]—A special assessment for the construction of a drain, levied and payable in a single amount, overdue, is an "arrear of municipal taxes" within the meaning of Art. 4555, R. S. Q., and is prescribed by three years. Judgment in Q. R. 15 S. C. 417 affirmed. *City of St. Henri* v. *Coursol*, Q. R. 9 Q. B. 115.

V. Property Assessable.

1. Income of foreign company — *Commercial corporation — Provincial Treasurer—Statement.*]—The defendant company manufactured cotton thread in England, but sold its products in Canada, including the Province of Quebec, R., a manufacturers' agent, carrying on business at Montreal, represented this company. He had an office at Montreal, with the name of this company and others upon the door. The name of this company also figured in advertisements published by R. The company sent goods to Montreal which R. sold for them on commission. The office expenses were paid by R. and also the expenses relating to the trade in the company's goods, including insurance and advertising, but the sales were for the benefit of the company.—*Held*, that the company came within the statute imposing taxes on commercial corporations (59 V. c. 15, Q.), and in particular were subject to the penalty imposed for default in transmitting to the Provincial Treasurer the statement required by this statute. *Lambe* v. *Dewhurst & Son (Ltd.)*, Q. R. 16 S. C. 326.

2. Income of foreigner — *Domicil—Change of—Intention.*]—By the St. John City Assessment Act, 59 V. c. 61, s. 2, "for the purposes of assessment any person having his home or domicil, or carrying on business, or having any office or place of business, or any occupation, employment, or profession, within the city of St. John, shall be deemed * * * an inhabitant and resident of the said city."

J. carried on business in St. John as a brewer, up to 1893, when he sold the brewery to three of his sons, and conveyed his house and furniture to his adult children, in trust for them all. He then went to New York, where he carried on the business of buying and selling stocks and other securities, having offices for such business and living at a hotel, paying for a room in the latter

only when occupied. During the next four years he spent about four months in each at St. John, visiting his children and taking recreation. He had no business interests there, but attended meetings of the directors of the Bank of New Brunswick during his yearly visits. He was never personally taxed in New York, and took no part in municipal matters there. Being assessed in 1897 on personal property in St. John, he appealed against the assessment unsuccessfully, and then applied for a writ of *certiorari*, with a view to having it quashed.

Held, that, as there had been a long continued actual residence by J. in New York, and as on his appeal against the assessment he had avowed his *bonâ fide* intention of making it his home permanently, or at least for an indefinite time, and his determination not to return to St. John to reside, he had acquired a new home or domicil, and that in St. John had been abandoned, within the meaning of the Act. *Jones* v. *City of St. John*, 20 Occ. N. 112, 30 S. C. R. 122.

3. Railways — *Business of—Municipal by-laws—Construction of statute — Voluntary payment—Recovery back.*]—The statute 29 V. c. 57, consolidating and amending the Acts and Ordinances incorporating the city of Quebec, by s.-s. 4 of s. 21 authorizes the making of by-laws to impose taxes on persons exercising certain callings, "and generally on all trades, manufactories, occupations, business, arts, professions, or means of profit, livelihood or gain, whether hereinbefore enumerated or not, which now or may hereafter be carried on, exercised, or in operation in the city; and all persons by whom the same are or may be carried on, exercised, or put in operation therein, either on their own account or as agents for others; and on the premises wherein or whereon the same are or may be carried on, exercised or put in operation." *Held*, that the general words of the statute are sufficiently comprehensive to authorize the imposition of a business tax upon railway companies; and, further, that the power thus conferred might be validly exercised by the passing of a by-law to impose the tax in the same general terms as those expressed in the statute. *Held*, per Strong, C.J., that where taxes have been paid to a municipal corporation voluntarily and with knowledge of the state of the law and the circumstances under which the tax was imposed, no action can lie to recover the money so paid from the municipality.

Judgment in Q. R. 8 Q. B. 246 affirmed. *Canadian Pacific R. W. Co.* v. *City of Quebec, Grand Trunk R. W. Co.* v. *City of Quebec*, 30 S. C. R. 73.

4. Street railway—*Items—Appeal.*]—Although a street railway is operated as a continuous system through all the wards of a city, the portion of the rails, poles, and wires in each ward must be assessed in that ward, and in making the assessment the rails, poles, and wires must be treated as so much dead material, and not as necessary portions of a going concern.

Bridges built and used by a street railway as part of their system are subject to assessment, but must be assessed in the same way as the rails, poles, and wires.

Consumers' Gas Co. v. *City of Toronto*, 27 S. C. R. 453, *In re Bell Telephone Company Assessment*, 25 A. R. 351, and *In re Toronto Railway Company Assessment*, 25 A. R. 135, applied.

Upon an appeal to a board of County Court Judges from the Court of Revision coming on for hearing, the board, at the request of the city corporation, and without any previous notice or assessment or application to the Court of Revision, added to the items of assessable property of a railway company, a certain amount as the value of the portion of the streets of the city "occupied" by the company.

Held, that the board of County Court Judges had no jurisdiction to make this addition, the amendment made by s. 5 of 62 V. c. 27 not then being in force.

Semble, that the railway company were not liable to assessment in respect of the portions of the streets occupied by them. *In re London Street Railway Assessment*, 20 Occ. N. 62, 27 A. R. 83.

5. Telephone poles and wires — *Real estate—Principle of valuation.*]—The poles, wires, etc., of a telephone company are immovable property by nature, and as such are taxable property within the meaning of Art. 709, M. C.—In the valuation of real property for the purpose of municipal assessment thereof, the cardinal principle to be observed is that of equality with valuation of other real estate, and to value any real estate at such appraisement as it would bring when taken down and removed, and therefore in the form of movables, is not valuing it as "real estate." *Bell Telephone Co.* v. *Township of Ascot*, Q. R. 16 S. C. 436.

VI. Tax Sale.

1. Injunction—*Exemption — Court of Revision—Appeal to—Estoppel.*] — An injunction may be granted to restrain a

tax sale. The limits of such jurisdiction discussed.—It is not necessary that exemption from taxation should be raised before the Court of Revision; and a person wrongfully assessed by reason of exemption is not estopped by appealing to the Court of Revision. *Canadian Pacific R. W. Co.* v. *Town of Calgary*, 1 Terr. L. R. 67.

2. Opposition—*Motion to reject—Delay—Substitution — Curator—Parties — City charter — Statement of treasurer — Effect of.*]—A Court which is moved, by virtue of Art. 651 of the new Code of Procedure, to reject an opposition to the sale of realty, ought to reject it if it is convinced that the object is, not to protect the opposing party from an injustice, but to delay the sale without reason.—2. If the same party has already made several oppositions which have been rejected, there is a strong presumption that the new opposition has for its object nothing but to delay the sale unjustly.—3. The fact that land advertised for sale by the sheriff is comprised in a substitution, the curator of which has not been made a party, is not a legal reason for opposition to the sale. 4. When the sheriff, having already made a seizure of the land, receives from the treasurer of the city of Montreal a statement prepared in accordance with Arts. 396 to 399 of the new charter, stating that taxes are due to the city, upon the property in question, he ought to announce it for sale; he has no right to content himself with noting the statement as an *opposition à fin de conserver*. 5. A statement prepared by the treasurer of the city of Montreal by virtue of Arts. 396 to 399 of the new charter is equivalent to a judgment for the amount of taxes there set down, and the fact that the valuation roll upon which the taxes appear is contested cannot be invoked in opposition to the sale of the land mentioned in the statement. *City of Montreal* v. *Maudeville*, 2 Q. P. R. 377.

See REGISTRY LAWS, I. 2.

VII. OTHER CASES.

1. Irregularity in assessment — *Recovery of taxes paid.*]—Where an assessment levied in the ordinary manner has been acquiesced in by the person assessed, and paid without protest, and without any complaint being laid before the assessors, or the institution of any appeal provided by law from their decision, an action will not lie for the recovery of the amount, as a void assessment illegally exacted, on the ground that there was an irregularity in the method of fixing the valuation. *Bogie* v. *City of Montreal*, Q. R. 16 S. C. 593.

2. Reduction of assessment — *Appeal—Resolution of council.*]—Every landowner, being a municipal elector, may appeal from the decision of the municipal council reducing the amount of the assessment of lands in the municipality, and that even when he has no right to the land in question and was not present at the meeting of the council at which the assessment of these lands was reduced. The resolution of a municipal council, adopted in the month of September, declaring that at the time of the annual revision of the assessment roll, in the month of July previous, the council had by mistake reduced the assessment of a parcel of land, and fixing the amount at which that parcel should have been valued, is illegal. *Bastien* v. *Parish of St. Vincent de Paul*, Q. R. 16 S. C. 561.

3. Special Rate — *Bonus by-law — Clerk — Collector's roll — Debentures, sale of.*] — While a by-law of a township corporation provided for the raising by the issue and sale of debentures of a certain sum to be paid by way of bonus to a railway company, and for the levying of an annual rate for the purpose of paying the debentures:—

Held, that it was the duty of the township clerk under s. 129 of the Assessment Act, without any further direction an authorization, to insert in the collectors' rolls the amount with which each ratepayer was chargeable under such by-law; and it was not necessary that the amount leviable each year under such by-law should be mentioned in the annual by-law authorizing the levy of sums for ordinary expenditure; and s. 402 of the Municipal Act had not the effect of making it necessary.

Clarke v. *Town of Palmerston*, 6 O. R. 616, distinguished.

2. That the rate could be levied notwithstanding that none of the debentures had been sold.

3. That the failure to collect the rate for the first year after the passing of the by-law did not cause the failure of the whole scheme.

Semble, that if the scheme should fail and nothing be paid to the railway company, the ratepayers could recover their money from the corporation. *Bogart* v. *Township of King*, 20 Occ. N. 384, 32 O. R. 135.

ASSIGNMENT.

See CHOSE IN ACTION.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKRUPTCY AND INSOLVENCY, I.—COMPANY, II. 1, 3.

ASSIGNMENT OF LEASE.

See LANDLORD AND TENANT, IV.

ASSOCIATION.

See VOLUNTARY ASSOCIATION.

ASSUMPSIT.

See PLEADING, VII. 1.

ATTACHMENT OF DEBTS.

I. GENERALLY — WHAT DEBTS ATTACHABLE.
II. PRACTICE AND PROCEDURE IN GARNISHMENT.
III. OTHER CASES.

I. GENERALLY—WHAT DEBTS ATTACHABLE.

1. Alimentary allowance — *Prior and subsequent.*]—According to the Quebec procedure, under Art. 599, paragraph 4, there is no distinction, as regards the right to attach alimentary allowances, between a debt prior to and one subsequent to the act by virtue of which the allowance is paid.—2. Allowances may, therefore, be attached to answer all alimentary debts.—3. The distinction which in France results from Art. 582 of the Code of Procedure does not exist in our law. *Labrecque* v. *Gauthier*, 2 Q. P. R. 494. (*Contra*, *Madden* v. *O'Regan*, Q. R. 7 S. C. 401.) —

3. Commission of agent — *Portion attachable—Set-off.*]—The defendant was the agent of the garnishees, an insurance company, earning a salary of one dollar a year and a commission which he retained upon premiums which he received for the company, to whom, after making the deduction, he remitted the balance of the premiums. In answer to the garnishing process, the garnishees declared these facts, adding that they owed the defendant nothing. Subsequently, upon an order that they should declare the amount of the commission which the defendant had retained upoo premiums collected since the service of the garnishing process, the garnishees declared that the defendant had retained $80.70 for commission, adding, however, that he owed them more than that amount.

Held, that the act of the agent in retaining the commissions being the act of the company, the latter was to be regarded as having paid the amount of the commissions thus retained, and these payments having been made since the service of the process, the plaintiff was entitled, without contesting the declaration of the garnishees, to demand that they should pay him the amount. —2. But the commission thus kept back by the defendant fell under Art. 599. C. P. C., paragraph 11, and the attachment, therefore, extended only to one-fifth of the amount so paid.—3. The garnishees could not set off against such commissions the amount which the defendant owed them, set-off not operating to the prejudice of the garnishing process. *Gauthier* v. *Huot*, Q. R. 16 S. C. 242..

3. Company—*Debts of servants to.*]—There is nothing to hinder the garnishing in the hands of employees of a defendant company of moneys which the employees personally owe to the company. *United Counties R. W. Co.* v. *Letendre*, 3 Q. P. R. 295.

4. Deposit in bank—*Double attachment — Foreign Court.*]—A deposit was made in the branch office in Manitoba of the bank, garnishee, and subsequently, the depositor having died, the amount of the deposit was paid into Court by the bank, under an order made by the Court in Manitoba, in proceedings taken in that Province concerning the estate of the deceased. The same sum having been subsequently attached in the Province of Quebec, where the head office of the bank is situated:—*Held*, that the garnishee was bound to obey the order made in the proceedings in Manitoba, and could not be compelled to pay the money a second time. *Harris* v. *Cordingley*, Q. R. 16 S. C. 501.

5. Fees of curator in insolvency.]—The curator appointed for the purpose of liquidating the property of an insolvent is a public functionary, whose fees are, according to the terms of Art. 599, C. P., not garnishable. *Snyder* v. *Gagnon*, 3 Q. P. R. 271.

6. Foreign corporation—*Debts due by.*] — Moneys payable in a foreign country, by a foreign corporation, for services performed in that country, under a contract made there, are not seizable under a writ of *saisie-arrêt*

issued out of a Court of this Province, although the foreign corporation may have a branch office and be served with the process in this Province. *Goodhue* v. *O'Leary*, Q. R. 17 S. C. 201.

7. Insurance moneys—*Insurance upon goods exempt from seizure — Opposition.*]—The plaintiff, having obtained a judgment against the defendant, issued garnishing process. The garnishees declared that they owed the defendant a certain sum as insurers of goods of the defendant which had been burnt. Upon this declaration they were condemned to pay such sum to the plaintiff. The plaintiff launched an *opposition à fin de conserver*, by which he asked to be collocated upon this sum because it represented goods which were exempt from seizure. The plaintiff attacked this opposition by a defence in law. *Held*, that exemption from seizure is a privilege, and a matter of strict law, and the law has not declared the price of the goods exempt from seizure, still less the fruits of the insurance upon them, the insurance being but an indemnity for their loss.—2. Even if the defendant had the right to be collocated upon the insurance moneys, he could not be until he had set aside, by means of a *tierce opposition*, the judgment by which the garnishee was condemned to pay the plaintiff. *St. Charles* v. *Cabana*, Q. R. 17 S. C. 233.

8. Insurance moneys — *Insurers — Third party—Policy—Execution.*]—By virtue of Art. 5604, R. S. Q., a policy of insurance effected on the life or a husband in favour of his wife is not exigible while it is in force, and money in the hands of the insurer after the maturity of the risk is not garnishable; but as soon as the proceeds of such a policy are in the hands of a third party they are garnishable. *Thibaudeau* v. *Warren*, Q. R. 17 S. C. 347.

9. Insurance moneys—*Proofs of loss —Option to replace destroyed property— Equitable execution.*] — 1. Under Rules 741 and 742 of the Queen's Bench Act, 1895, as amended by 60 V. c. 4, the claim of the assured, under a policy of insurance against loss by fire, which provides that the loss should not be payable until thirty days after the completion of the proofs of loss usually required, cannot be attached by garnishing order before such completion, although the property insured has been burnt.

Howell v. *Metropolitan District R. W. Co.*, 19 Ch. D. 508, and *Central Bank* v. *Ellis*, 20 A. R. 364, followed.

Canada Cotton Co. v. *Parmalee*, 13 P. R. 308, not followed.

2. The only kind of liability which may be attached under the above Rules is a purely pecuniary one, and must be absolute and not dependent upon a condition which may or may not be fulfilled; and, therefore, where a policy of fire insurance contained a condition giving an option to the company to replace the destroyed property instead of paying the insurance money, if they should so decide within a certain time, a garnishing order would be of no avail, if served before the expiration of that time, as an attachment of the insurance money, since it would not then be certain that any pecuniary liability would ever arise under the policy; *Simpson* v. *Chase*, 14 P. R., per Osler, J.A., at p. 286.

3. The provision in the Rules as to claims and demands which could be made available under equitable execution have not the effect of making such a liability subject to attachment thereunder. *Lake of the Woods Milling Co.* v. *Collin*, 20 Occ. N. 285, 13 Man. L. R. 154.

10. Salary—*Alimentary debt—Payment into Court.*]—The part of a salary which is not attachable to answer ordinary debts may be attached for an alimentary debt. The garnishee must pay into Court the whole sum owing to the judgment debtor; and in relying on the exemption provided by Art. 599, C. P. C., he excepts the rights of others. *Beattie* v. *Raper*, Q. R. 16 S. C. 508.

11. Salary—*Husband working for wife.*] —The defendant's wife and her sister were carrying on business in copartnership. The defendant's wife was separated as to property. The defendant was the manager of the firm, but he had no stated salary, his wife being bound by the terms of the partnership agreement to provide a working representative without expense to the firm. On an attachment in garnishment by the plaintiff, of the value of the husband's services, in the hands of the wife:—

Held, that where no fraud is proved, and a husband voluntarily looks after the affairs of his wife, a *marchande publique* and separated as to property, without any agreement as to remuneration, the Court will not hold that the services of the husband must be paid for, and will not fix a sum representing the value of such services, which sum would be subject to attachment for a judgment against the husband. *Arnoldi* v. *Stewart*, Q. R. 17 S. C. 252.

12. Salary—*Husband working for wife.*] —*Held*, affirming the judgment in Q. R. 15 S. C. 322, that a husband who works for his wife—in this case the husband

had become a bankrupt, and the wife had continued his business, the husband working for the benefit of his wife as he had before done for his own benefit —has no right to any salary, and his creditors cannot, upon attachment of moneys in the hands of his wife, claim the value of his services. *St. Pierre* v. *Towle*, Q. R. 17 S. C. 361.

13. Salary—*Organist.*]—The salary of a church organist falls under the operation of Art. 599 (*a*), C. P. C., and is not garnishable except as to a proportion therof as indicated in the enactment. *Bell* v. *Larivée*, Q. R. 16 S. C. 229.

14. Salary—*Police officer — Payment—Agent.*]—The salary of a police officer employed by the board of police commissioners for a city was attached by a judgment creditor. Before the service of the attaching order upon the city corporation, a cheque for the salary had been handed by the city treasurer to a police inspector to be handed to the judgment debtor, but had not been handed to the latter. The attaching order was subsequently, and before the cheque reached the judgment debtor, served upon the inspector, who was not a party to or named in the order. *Held*, upon the evidence, that the inspector was not the agent of the city corporation to pay the judgment debtor, but the implied agent of the latter to receive payment for him; and therefore payment had been made when the order was served. It was not the duty of the corporation to stop payment of the cheque, and they did not do so. *Cohen* v. *Hale*, 3 Q. B. D. 371, distinguished. *Verney* v. *Guthrie*, 20 Occ. N. 313.

15. Salary—*Public officer—Assessor.*]—*Held*, affirming the judgment in Q. R. 15 S. C. 262, that a city assessor is a public officer within the meaning of Art. 599, C. C. P., and his salary is not liable to garnishment. *Stewart* v. *Éuard*, Q. R. 8 Q. B. 404.

II. Practice and Procedure in Garnishment.

1. Contestation — *Costs.*]—Where a garnishee declares that he is not indebted, the defendant need not delay to take proceedings for the quashing of the writ until the plaintiff has determined whether or not he will contest the declaration; but if he chooses to file a contestation of the attachment instead of moving for his discharge from the seizure as allowed by Art. 688, C. C. P., he will only be allowed the costs of an appearance and a motion. *Pallascio* v. *Champeau*, Q. R. 17 S. C. 306.

2. Declaration of garnishee—*Admissions—Judgment.*]—Answers given to interrogatories by a garnishee who declares that he owes the defendant nothing do not form part of his declaration, and do not justify the garnishing creditor in entering the matter for judgment upon such declaration. *Laframboise* v. *Rolland*, M. L. R. 2 S. C. 75, and *Grant* v. *Federal Bank of Canada*, 29 L. C. J. 333, followed.—In this case the garnishee having declared that he owed nothing to the debtor, but having added, in answer to interrogatories of the plaintiff, that the debtor was in his employment in receipt of a salary of $100 a month: that he had drawn $400 more than his salary during the previous year; that he, the garnishee, had paid nothing to the debtor since service of the attaching order; and that if the garnishing proceedings were discontinued, the defendant would have no right to draw anything:—*Held*, that the plaintiff had a right in law to contest the declaration of the garnishee; which declaration could not serve as a foundation for a judgment against the garnishee. *White* v. *Sabiston*, Q. R. 16 S. C. 597.

3. Declaration of garnishee—*Motion for judgment.*]—A plaintiff cannot set down a garnishing matter upon motion for judgment *ex parte* upon the declaration of the garnishee, when that declaration does not contain an admission pure and simple that a certain sum is due to the defendant. *White* v. *Sabiston*, 3 Q. P. R. 124.

4. Declaration of garnishee—*Statement—Default—Order for payment.*] — A garnishee who neglects to produce a statement complementary to his declaration may be ordered to pay just as though he were the primary debtor. *White* v. *Sabiston*, 3 Q. P. R. 193.

5. Extension of time—*Garnishee—Ignorance.*]—Where on the return of a *saisie-arrêt* attaching salary alleged to be due to the judgment debtor by a railway company, they declared that they had not been able to ascertain whether the debtor was still in their employment, as he had been working at a great distance from their head office, the Court declared the seizure in the hands of the garnishees binding, and adjourned the hearing, *Donegan* v. *Cassidy*, 2 J. P. R. 451.

6. Fraud—*Issue—Amount in controversy—County Court—Jurisdiction—Residence of garnishee — Receiving order.*]—Where it was charged by a judgment creditor that a fraudulent arrangement had been made between the judgment debtor and his employers, the garnishees, whereby a third person had been substituted for

the debtor, as the servant of the garnishees, and money paid to such third person, while the debtor continued to do the work:—

Held, that the judgment creditor was entitled to have an issue directed, to which the third person should be a party, to determine whether there was at the time of the service of the attaching order any debt due or accruing from the garnishees to the debtor, without bringing home a case of fraud to the persons against whom it was charged; it was sufficient to shew unexplained facts and circumstances so unusual as to create a strong suspicion that fraud had been practised.

Held, also, that the Judge of a County Court in which the judgment has been recovered has power, when the amount claimed to be due from the garnishee is so large as not to be within the jurisdiction of a County Court, to make the garnishing summons returnable before himself, even where the garnishee resides in another county.

Held, also, that an order for a receiver should not be made in respect of a fund which may be reached by garnishing process. *Millar* v. *Thompson*, 20 Occ. N. 454, 19 P. R. 294.

7. Garnishees—*Executors—Pleading — Costs.*]—Garnishees, testamentary executors, who declare that the legacy to the debtor is, under a clause in the will, unattachable, will be mulcted in costs if they reply to a dispute note of their declaration in place of submitting themselves to the Court, even if this dispute note accuses them of conspiring with the debtor.—2. A reply by the garnishees to a dispute of their declaration should in all cases be stamped as a pleading. *Richer* v. *Arnton*, 2 Q. P. R. 569.

8. Judgment—*Irregularity — Questioning.*]—A defendant who has not, either by way of appeal or opposition, moved against a judgment which has all the judicial characteristics of a judgment of the Superior Court, but has been recovered against him *ex parte*, cannot contest garnishing process issued in execution of such judgment by pleading that it is tainted with irregularities and illegalities. *United Counties R. W. Co.* v. *Letendre*, Q. R. 9 Q. B. 52, 3 Q. P. R. 295.

9. Money in Court—*Order—Nullity.*]—An order made by a County Judge that garnished moneys remain in Court to abide the event of a new action to be commenced forthwith (a former suit in respect of the same cause of action being dismissed by the same order) is not a nullity, and if not appealed against is valid. *King* v. *Boultbee*, 20 Occ. N. 421, 7 Brit. Col. L. R. 318.

10. Reduction of amount.]—Where a creditor claiming $3,500 attached a fund of more than $50,000 deposited to the defendants' credit in another cause, a motion to reduce the sum attached to the amount of the creditor's demand, plus an estimated sum for costs, was refused. *Copland* v. *Waterbury*, 2 Q. P. R. 384.

11. Service of summons—*Domicil of defendant — Writ — Stamps.*] — A writ of *saisie-arrêt* will be set aside if it has not been served on the defendant at his domicil of election, he having no real domicil in the district in which judgment in the principal action was obtained.—A writ is also void if it is insufficiently stamped and if the copies certified by the clerk of the Court have no stamps at all upon them. *Duchêne* v. *McAvoy*, 3 Q. P. R. 235.

III. Other Cases.

1. Judgment against garnishee—*Consent to pay—Rights of other creditors.*]—The service upon the garnishee of an order attaching a debt due to the debtor creates a lien in favour of the garnishor, and this lien becomes absolute between the garnishor and the garnishee after a judgment against the garnishee or by reason of his consent to pay the garnishor as in the case of the transfer of a debt; and the other creditors, even in the event of the insolvency of the debtor, have no right to the fund attached. *Lacroix* v. *McGreevy*, 3 Q. P. R. 21, Q. R. 17 S. C. 187.

2. Purchase money of land—*Deed —Acknowledgment — Estoppel — Burden of proof.*]—Where there is an acknowledgment under seal in a transfer of land that the consideration or purchase money has been paid, the vendor cannot, in the absence of fraud, maintain an action at law against the purchaser for such purchase money; he is estopped by his deed. *Baker* v. *Davey*, 1 B. & C. 704, and *Donohoe* v. *Hull*, 24 S. C. R. at p. 689, followed. The vendor may proceed in equity, but *in rem*, by asserting a lien on the land sold for the purchase money (and as incidental to that relief may have a personal order against the purchaser for the deficiency, if any, as in *Sanderson* v. *Burdette*, 16 Gr. 119, 18 Gr. 419, and in *Shelly* v. *Shelly*, 18 Gr. 495). But the Court has no power in garnishee proceedings to give effect to such lien, or to order the purchaser to pay over the purchase money to the creditor of the vendor. *Held*, also, in an issue arising out of a garnishing application, that the onus of proving the indebtedness of the garnishee to the judg-

ment debtor was upon the judgment creditor, and he had failed to satisfy it. *Genge* v. *Wachter*, 20 Occ. N. 158.

See COMPANY, II. 2—COSTS, III. 3, IV. 11, IX. 3—EVIDENCE, VI. 1—EXECUTION, IV. — FRAUDULENT CONVEYANCE, 6—INJUNCTION, II. 1—LUNATIC, 3—STAY OF PROCEEDINGS, 6.

ATTACHMENT OF GOODS.

1. Affidavit—*Necessary statements.*]—To obtain a *saisie-conservatoire* it is sufficient to allege in the affidavit simply one of the causes given in Art. 955, C. P., and it is not necessary to make any allegation of fraud or concealment, as in the case of an arrest, which cannot be likened to a *saisie-conservatoire*. *Bouchard* v. *Plamondon*, Q. R. 16 S. C. 483.

2. Declaration—*Clerical error—Costs.*]—It is not a ground for declaring a *saisie-revendication* irregular that the plaintiff has not conformed to Arts. 909, 948, C. P., when the irregularity has been rectified, and was the result of a clerical error; but the costs upon an exception thereto should be borne by the plaintiff. *Ruel* v. *Langlois*, 3 Q. P. R. 132.

3. Issue of writ — *Irregularity — Waiver.*]—Any irregularity in the issue of a writ of *saisie-conservatoire* was waived by the defendant having, before moving to quash the writ, made a motion to fix the amount of bail by the giving of which the property attached might be relieved from seizure under the writ. *Bélanger* v. *Godbout*, 3 Q. P. R. 107.

See ABSCONDING DEBTOR — HUSBAND AND WIFE, V. 2—PARTICULARS, II. 5—PLEADING, II. 2.

ATTACHMENT OF PERSON.

See AUCTION.

ATTORNEY.

See DISAVOWAL—SOLICITOR.

ATTORNEY-GENERAL.

See COMPANY, IV. 1—CROWN, IV. 7—PARTIES, III. 4.

AUCTION.

Purchaser at — *Payment of price — Attachment of person — Nullities — Acquiescence.*]—At a judicial sale of chattels by auction, the knocking them down to a person makes him the owner, even if he does not pay the price immediately.—A rule to attach the purchaser for refusal to produce the goods seized or to return them will be discharged.—The Quebec Code of Procedure recognizes no nullities except those formally prescribed by law.—A person cannot claim the nullity of a sale which he has acquiesced in by filing an *opposition à fin de conserver* which remains on the record. *Duchêne* v. *Collins*, Q. R. 17 S. C. 136.

See SALE OF GOODS, 1.

AUCTIONEER.

See MUNICIPAL CORPORATIONS, XI. 1.

AUDIT.

See PARTICULARS, II. 8.

BAIL.

Action populaire — *Delay.*]—A motion for bail in an *action populaire*, under Art. 180, C. P., is subject to the delay of preliminary exceptions, and will be dismissed if it is served the fourth day after production. *Yale* v. *Monette*, 2 Q. P. R. 480.

See ARREST, 1—CANADA TEMPERANCE ACT, 1.

BAILIFF.

See TRESPASS, I.

BAILMENT.

Particular article — *Destruction by fire—Liability.*]—The plaintiff, a butcher, killed three oxen at the defendants' abattoir, upon the ordinary terms, one of which was, that the meat should be kept by the defendants for at least 24 hours, on ice, afterwards to be delivered to the plaintiff on demand. During the 24 hours the defendants' building containing the plaintiff's meat was destroyed by fire, from an unknown cause. —*Held*, that the defendants were not

discharged from their obligation to deliver the meat by alleging and proving that the building was destroyed by a fire of which the cause was unknown; it was necessary to shew that it was accidental or caused by *vis major* and not from any cause for which the defendants could be held responsible. *Versailles* v. *La Compagnie de L'Union des Abattoirs de Montréal*, Q. R. 16 S. C. 227.

See SALE OF GOODS.

BANKRUPTCY AND INSOLVENCY.

I. ASSIGNMENT FOR CREDITORS.
II. CONTESTATION OF SCHEDULE.
III. PREFERENCE.

See BANKS AND BANKING, 1, 5—BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 8—COMPANY, II.—COSTS, IV. 12—EVIDENCE, VI. 2, 3—EXECUTORS AND ADMINISTRATORS, 5—FRAUDULENT CONVEYANCE—FRAUDULENT PREFERENCE—STATUTES, V. 1.

I. ASSIGNMENT FOR CREDITORS.

1. Demand of—*Contestation—Petition — Filing — Service—Notice—Costs.*]—*Held*, that a delay of two days between the filing of a petition to contest a demand of abandonment and the service thereof upon the claimants, is not unreasonable.

2. That such a petition will not be rejected on motion because it was not accompanied with a notice of the time when it would be presented.

3. That the costs of a motion to reject such petition will abide the final issue on the petition.

4. That proceedings upon such a petition must be carried on in the same manner as upon petitions to quash a writ of *capias*. *Manson* v. *Forand*, 2 Q. P. R. 362.

2. Demand of—*Evidence—Acquiescence —Admission in bilan — Interest—Mise en demeure.*]—The fact that the defendant acquiesced in a demand of abandonment made upon him based on the claim sued for, and that in his *bilan*, deposited with the abandonment made by him upon such demand, he acknowledged an indebtedness to the plaintiff in the sum sued for, constitutes sufficient evidence of the indebtedness, in the absence of any proof that in acquiescing in the demand of abandonment and in admitting the debt in his *bilan* the defendant acted in error.—2. A demand of abandonment acquiesced in by the debtor, constitutes a sufficient *mise en demeure* to cause interest to run on the debt, on which the demand of abandonment was based, from the date of such demand. *Laberge* v. *Brosseau*, Q. R. 16 S. C. 430.

3. Demand of — *Security for debt — Transfer of claims.*]—A transfer made by a debtor to his creditor of a right of redemption in land, with the stipulation that the creditor shall exercise such right "*si bon lui semble*," is not a *garantie* to the creditor which will prevent him from demanding an assignment of the property of his debtor.—2. The transfer by the same debtor to his creditor of an unliquidated claim for repairs and improvements made upon such land is not a payment in full of the creditor's claim, even when he afterwards becomes the owner of the land, but is only a part payment to the extent of the actual proved value of the repairs and improvements; and if, after giving credit for such value, there remains due a larger sum than $200, he still has a right to demand an assignment. *Bastien* v. *Pagnuelo*, Q. R. 17 S. C. 139.

4. Demand of—*Service — Affidavit.*]—It is sufficient to serve on the debtor the demand for an assignment, and to file it at the record office with a claim under oath and the documents justifying it. The service of the claim under oath upon the debtor at the same time as the demand for the assignment is not necessary; Art. 856, C. P. *Lamontagne* v. *Levert*, 3 Q. P. R. 272.

5. Exemptions—*Creditors' Trust Deeds Act — Remuneration of trustee — Costs.*]—The debtors, a firm of builders, assigned under the Creditors' Trust Deeds Act all their personal property, credits, and effects that might be seized and sold under execution.

The assets were not sufficient to pay any part of the claims of ordinary creditors, and two members of the firm claimed as exemptions chattels to the value of $500 each (under the Homestead Act) selected out of the lumber and materials around the factory of the firm.

Held, that by the form of assignment the claimants were precluded from claiming exemption. Trustee's remuneration fixed at five per cent. *In re Ley*, 20 Occ. N. 143, 7 Brit. Col. L. R. 94.

6. Exemptions—*Selection of—Executions Act.*] — When a debtor merchant makes an assignment in the form prescribed by the Assessments Act, R. S. M. c. 7, of all his stock-in-trade and personal property, etc., liable to seizure under execution, to a trustee for creditors, the assignee has a right to select such articles as would be exempt under

the Executions Act, R. S. M. c. 53, s. 43, in the absence of a selection by the debtor; and, if he appropriates and sells only a portion of the property coming under the head of any class of the statutory exemptions, and leaves to the debtor a sufficient quantity of the same kind of property to reach the prescribed value, he will not be liable to an action for the value or the proceeds of the portion sold. *Cloutier* v. *Georgeson*, 20 Occ. N. 138, 13 Man. L. R. 1.

See ARREST, III. 3, 9—FRAUDULENT CONVEYANCE — INJUNCTION, II. 1 — LANDLORD AND TENANT, IV. 1.

II. CONTESTATION OF SCHEDULE.

Time—*Proof — Exception à la forme—Particulars.*]—Upon a contestation of the schedule by the curator to an assignment of effects, the insolvent, who awaits the production of exhibits by the curator and the order of the Court before filing his reply to the contestation, and who then files exceptions to the form against vague allegations and motions for particulars, is not delaying the proceedings upon the contestation so as to authorize the Judge, under paragraph 3 of Art. 887, C. P. C., to grant to the curator an extension of time for two months to prove the allegations of his contestation.—In this case the Judge having fixed a period of six days for the filing of the reply, the insolvent had a right, in the first three days of this period, to launch a motion by way of exception to the form, and, before the expiration of this period, a motion for particulars, and no valid objection could be made to his not having made these motions within three days from the filing of the contestation. — The contestation of the schedule of an insolvent having a penal character, every allegation should set out the facts on which it is based so as to identify them and give notice to the insolvent of the acts of which proof will be made against him. Thus, allegations that the insolvent has fraudulently concealed notes to an amount exceeding $10,000, a sum of about $7,000 received by him in divers amounts at his shop, and divers other sums of money, amounting in all to more than $25,000, are too vague, and the Superior Court had good grounds for ordering that the facts should be set out.—Nevertheless, the Superior Court having ordered the curator to set out the facts in support of his allegations of concealment, and having afterwards dismissed the exception to the form of the insolvent with costs against the curator, the insolvent had no ground for complaining of the judgment dismissing his exception to the form, since he had been granted, upon his motion for particulars, all that he could obtain upon his exception to the form. *Sylvestre* v. *Letang*, Q. R. 8 Q. B. 385, 2 Q. P. R. 367.

See ARREST, III. 3, 9.

III. PREFERENCE.

1. Bill of sale — *Knowledge of insolvency—Onus—Antecedent agreement — Affidavit—Consideration—Amendment.*]—A. G. made a bill of sale to his brother, W. G., the alleged consideration being a prior agreement that W. G. should "go good" for amounts owing to two of the creditors of A. G. and a present cash advance of $20.

The evidence shewed that at the time the alleged agreement was made, and at the time the bill of sale was given, A. G. was in insolvent circumstances, to the knowledge of W. G., and further that W. G. had not carried out the agreement in the terms alleged.

Held, that the bill of sale was void as against creditors within the terms of the statute, Acts of 1898, c. 11, s. 2, s.-s. 2, and must be set aside.

Held, that the burden was on the defendants of establishing the validity of the bill of sale, and that this could only be done by proving a *bona fide* antecedent agreement for the security which was given, or a present advance of money on the faith of the security.

Semble, that where a *bona fide* agreement is established, which has been subsequently carried out in good faith, it will be sustained.

The evidence shewed that the amount set forth as the consideration for the bill of sale was not due and owing when the affidavit was made, but the point that the affidavit was bad on this account was not taken in the pleadings.

Held, that it was open to the Court, on terms, to amend the pleadings, and to pronounce the judgment which the law and the facts warranted. *McCurdy* v. *Grant*, 32 N. S. Reps. 520.

2. Composition — *Fraud — Bills and notes—Indorsement.*]—An insolvent made a compromise with his creditors, borrowing from his wife the money to pay the composition. She borrowed the money from one of his creditors, agreeing to pay a bonus of a large amount, and giving to the creditor for his composition payment and the bonus, her promissory notes indorsed by her husband, with a mortgage on her real estate, and a chattel mortgage on his stock, as collateral security. The creditor signed the composition agreement, nothing being said about the bonus to the other creditors, who knew, however, that some arrangement had been made with this

creditor for the supply of the necessary funds. The insolvent, after carrying on business for some time and incurring further liabilities, made an assignment for the benefit of his creditors.

Held, per Burton, C.J.O., agreeing with the judgment of MacMahon, J., that the transaction with the wife was valid and not a fraud on the composition, and that the creditor was entitled to rank upon the notes as far as this question was concerned.

But the notes in question having been made by the insolvent's wife, payable to the creditor's order, and having been indorsed by the insolvent before they were handed to the creditor:—

Held, *per Curiam*, on objection taken in this Court, that the insolvent was not liable as indorser, and that the creditor could not rank on his estate.

Semble, per Burton, C.J.O., that an objection on either ground to such a claim to rank cannot be taken under s. 9 of the Act by a dissentient creditor for his own benefit against the wishes of the assignor and the majority of the creditors, and an order purporting to be made under this section allowing the dissentient creditor to contest the claim in the assignee's name is invalid. *Small* v. *Henderson*, 19 Occ. N. 267, 27 A. R. 492.

3. Compromise — *Secret agreement — Bribery — Inspector.*]—A commercial firm having made an abandonment of its property for the benefit of its creditors, a secret arrangement was made whereby a particular creditor, without any legal right to preference or priority, was secured an advantage over the other creditors, through the assistance of one of the inspectors of the insolvent estate, to whom was promised a sum of money for his personal use, upon his advising the acceptance of a proposal for the purchase of the estate upon a composition at a rate on the dollar to be paid to the creditors of the estate generally. The preferred creditor was, under the concealed arrangement, to receive an amount greater than the rate of the composition proposed, such additional sum to be paid by a third person who took no direct interest in the estate purchased. *Held*, that the agreement was fraudulent and void; that the proposed payment by the third person was as much a fraud upon the general body of the creditors as if it had been promised by the insolvent firm itself; and that the additional sum could not be recovered by the creditor so preferred.

Held, also, that the promise of the payment to the inspector was a bribe, and, for that reason alone, the transaction to induce which it was given should be adjudged corrupt, fraudulent, and void. *Brigham* v. *Banque Jacques Cartier*, 20 Occ. N. 371.

4. Promise to give security—*Presumption—Rebuttal — Payment — Transfer of security—Cheque — Promissory notes—Discount by third person.*] — In April, 1898, a mercantile firm obtained from a bank accommodation of about $8,200 for the purpose of buying goods upon promissory notes indorsed for their accommodation by the defendant, a brother of one of the partners, they promising him to retire the notes out of the proceeds of the sales of the goods. The proceeds were not so applied, to the defendant's knowledge, and the notes were from time to time renewed in full, the defendant indorsing them upon each renewal. He was satisfied by a general promise that they would secure him, but no security was ever definitely mentioned, nor did he ever press for it. On the 27th May, 1899, the firm sold out their assets for nearly $11,000, their liabilities being about $19,000. Before the sale was carried out the defendant became aware that the firm was insolvent. The purchase money was paid to the firm, $1,000 in cash, $5,000 by a cheque to their order, and the remainder by promissory notes. The firm handed over the cash to the defendant, and indorsed the cheque and some of the notes to him, and he with the cash and the proceeds of the cheque and notes, the latter being at his request indorsed and discounted by a stranger for him, retired all the notes upon which he was liable, and paid, besides, some rent, taxes, and other debts due by the firm. On the 2nd June, 1899, the firm assigned to the plaintiff for the benefit of their creditors.

Held, that the promise to give the defendant security could only mean that the firm, being unable to pay or secure the notes for fear of bringing on immediate insolvency, would pay or secure them in the future in case their affairs should become desperate, and such a promise was not sufficient to rebut the statutory presumption of a preference.

The payment of $1,000 in cash to the defendant could not be attacked, and that should be treated as having formed part of the sum of $5,200 paid to retire two of the notes.

The $5,000 cheque transferred to the defendant was not a payment in cash, but was the transfer of a security, and he was liable to repay the proceeds of it, less the portion expended in paying debts, etc., of the firm.

The notes indorsed by the firm, and handed to the defendant for the purpose of procuring the payment of the remaining note which he had indorsed for them, were handed by him to the stranger in pursuance of that purpose,

and what the latter did was done for the defendant, and not for the firm, and must be treated as if done by the defendant himself. *Armstrong* v. *Johnston*, 20 Occ. N. 334, 32 O. R. 15.

5. Recel — *Capias.*] — A preferential payment is a "recel" in the sense of the statute, and the alienation of his property, whether real or personal, by an insolvent debtor, with intent to defraud — which intent may be deduced from circumstances — is also a "*recel*" which is ground for a *capias*. *Quebec Bank* v. *Elliott*, Q. R. 16 S. C. 393.

6. Sale of assets—*Extinguishment of debt.*]—T and C., doing business under the name of T. & Co., made an assignment for the benefit of creditors, and T. then induced the plaintiffs, creditors, to pay off a chattel mortgage on the stock and a composition of 25 cents on the dollar of unsecured claims, the plaintiffs to receive their own debt in full with interest. The assignee of T. & Co. then transferred all the assets to the plaintiffs, and the arrangement was carried out, the plaintiffs eventually re-conveying the assets to T., taking his promissory notes and a chattel mortgage as security. In an action against T. & Co. on the original debt:—

Held, affirming the judgment in 26 A. R. 295, 19 Occ. N. 211, that the original debt was extinguished, and C. was released from all liability thereunder. *Dueber Watch Case Mfg. Co.* v. *Taggart*, 20 Occ. N. 321, 30 S. C. R. 373.

7. Sale to particular creditor—*Knowledge — Bona fides — Delivery.*]—A debtor may in good faith sell to his creditor, subject to a right of redemption, all his chattels, being all the property that he has, if such creditor does not know that the debtor has at the time of sale another creditor, and the latter cannot attack such a sale made pursuant to an agreement anterior to the debt, unless he proves that the purchaser knew that his vendor had other creditor, and therefore was making himself insolvent by this sale.—A sale of chattels, subject to a right of redemption, made by an insolvent debtor to his creditor, in good faith, in payment of the debt due, has the effect, even without delivery, of taking the goods out of the patrimony of the vendor, and his other creditors cannot seize them, although there has been no delivery. *Beaubien* v. *Perrault*, Q. R. 17 S. C. 410.

8. Secret agreement—*Onus—Voluntary payments—Assignee for creditors—Particular creditors — Privity.*] — In an action by certain creditors of an insolvent and by his assignee for the general benefit of creditors to recover from the defendants, who were also creditors of the insolvent, certain sums of money paid by the insolvent to the defendants before the assignment under the terms of an alleged secret agreement:—

Held, that the onus of proof was on the plaintiffs.

Held, also, that, the payments not being procured by oppression or extortion on the part of the plaintiffs, but being voluntary, the assignee could not recover.

Review of English cases on this point.

Nor could the other plaintiffs, not being the whole body of creditors, recover, even when using the name of the assignee as plaintiff, by virtue of an order under R. S. O. c. 147; and no privity such as would give a right of action was established between the creditor plaintiffs and the defendants by an agreement for an extension of time for payment entered into by these plaintiffs and defendants and the insolvent, prior to the alleged secret agreement. *Langley* v. *VanAllen*, 20 Occ. N. 437, 32 O. R. 216.

See TRIAL, IV. 4.

BANKS AND BANKING.

1. Cheque—*Acceptance — Suspension of bank before payment — Protest.*]—On the 11th July, 1895, the defendants gave L. & Co., in payment of an account, a cheque drawn upon the Quebec branch of the Banque du Peuple. The next day L. & Co. deposited the cheque to the credit of their account in the plaintiffs' bank at Montreal, and the plaintiffs on the 13th July sent it by mail to their branch at Quebec. The cheque was received at Quebec on the 14th July, a Sunday, and the next day, instead of having it paid by the branch of the Banque du Peuple, which had sufficient funds on hand, the manager of the plaintiffs at Quebec contented himself with having it accepted, intending the next day to have a general settlement with the Banque du Peuple of the cheques of which the two banks were respectively the holders. But the same evening the Banque du Peuple closed its doors, and the cheque was never paid.—*Held*, that, under these circumstances, the plaintiffs could not recover from the defendants the amount of the cheque.—The acceptance of a cheque by the drawee, who has on hand funds belonging to the drawer sufficient to pay the cheque, has the effect of discharging the drawer.—It is not necessary to protest a cheque in order to hold the drawer liable for non-payment. *Banque Jacques-Cartier* v. *Corporation de Limoilu*, Q. R. 17 S. C. 211.

2. Collateral security — *Crediting proceeds — Suspense account.*]—A bank gave a customer "a line of credit to $150,000, to be secured by collections deposited:"—

Held, that the bank was bound to credit the customer with the payments made from time to time to the bank on collateral notes deposited with the bank by the customer in accordance with the terms of the memorandum, and could not hold the payments in a suspense account until the maturity of the customer's own paper given to the bank to cover the line of credit, and take judgment against the customer for the full amount of that paper.

Judgment of the Supreme Court of Canada, 26 S. C. R. 611, affirmed. See also S. C., 23 A. R. 146, 26 O. R. 575. *Molsons Bank* v. *Cooper*, 20 Occ. N. 1, 26 A. R. Appx.

3. Deposit — *Decease of depositor — Promissory note — Right to deduct.*]—A testator, having a deposit to his credit in a bank at the time of his death, was a debtor to the bank on a note under discount, which had not then matured. After its maturity the bank brought this action on the note against his executors. The assets of the testator were insufficient to pay his debts in full. The deposit not having been withdrawn or demanded before the maturity of the note:—

Held, that the bank was entitled to deduct from the amount of the promissory note the amount at the credit of the deceased, and to rank on the estate for and receive a dividend on the balance. *Ontario Bank* v. *Routhier*, 20 Occ. N. 404, 32 O. R. 67.

4. Deposit—*Overdue note — Set-off.*] — The defendant was a depositor in a bank, the garnishee, and had there discounted a note which was not paid when due. The bank charged the note to the defendant's account, and the latter drew out the exact amount of the balance remaining to his credit.—*Held*, that a set-off had been thereby effected. *Thomas* v. *Smith*, Q. R. 16 S. C. 354.

5. Insolvency of bank—*Creditor—Set-off.*]—One who had become the holder of a cheque accepted by the bank and of a deposit receipt issued by it, at a time when such bank had suspended payment, but when it was believed by the public and announced by the directors that it would pay in full all moneys received on deposit, can set off the amount of the cheque and deposit receipt against a debt which he himself owes to the bank, and that in spite of the fact that the bank has afterwards been declared insolvent, and that its insolvency dates back to the time of the suspension. *People's Bank* v. *Langlois*, Q. R. 9 Q. B. 13.

See ATTACHMENT OF DEBTS, I. 4—CRIMINAL LAW, VII. 5—HUSBAND AND WIFE, X.—INTERPLEADER, 3—PARTIES, III. 2—PARTNERSHIP, III. 2—REVENUE, II. 2.

BAR COUNCIL.

See PROHIBITION, IV. 1.

BASTARD.

See INFANT, I. 1—SEDUCTION.

BAWDY-HOUSE.

See CRIMINAL LAW, VII. 2.

BENEFICE d'INVENTAIRE.

Motion — *Dilatory exception.*]—A defendant cannot by motion obtain time to plead for the purpose of setting up non-liability to debts beyond assets descended, such having to be secured by means of a dilatory exception, subject to certain delays and formalities. *Bell* v. *Garceau*, 2 Q. P. R. 407.

BENEFIT SOCIETIES.

See INSURANCE, V.

BICYCLE.

See NEGLIGENCE, 1.

BIGAMY.

See CRIMINAL LAW, I.—INFANT, I. 5.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Acceleration — *Insolvency — Presentment and notice.*]—Where a promissory note becomes payable before maturity by reason of the insolvency of the maker and the indorser, presentment and protest against the indorser are nevertheless necessary, and in the absence of protest he is discharged from his obligation. The provisions of the Bills of

Exchange Act, respecting presentment, protest, and notice of protest, are applicable to a note becoming due by reason of the insolvency of the parties. *La Banque Nationale* v. *Martel*, Q. R. 17 S. C. 97.

2. Action on note—*Pleading—Admissions—Presentment—Affidavit.*]—In an action upon a promissory note, the defendant who admits the amount and date thereof, and his signature as indorser, and denies all the other allegations, is prevented from pleading afterwards a special defence.

2. The plea alleging default of presentment of a note payable on demand must be supported by affidavit; if not it will be struck out on exception to the form. *Hawes* v. *Fulton*, 2 Q. P. R. 561.

3. Action on note — *Pleading — Demurrer — Indorsement in blank—Holder—Presumption.*]—In an action on a promissory note, a declaration in accordance with form 6 of Schedule A (Art. 123, C. C. P.) is sufficient, though there be no averment that the plaintiff is the holder of the note, nor by whom it was indorsed to him, nor that the plaintiff gave value therefor.

2. The Court, for the purposes of a demurrer, cannot look at papers filed with the declaration, such as the protest of a promissory note sued on.

3. When a promissory note is indorsed by the payee in blank, a person who brings suit thereon and produces the note, is presumed to be the holder in due course, and it is for the defendant to rebut this presumption by making the proof required by s. 30, s.-s. 2, of the Bills of Exchange Act, *i.e.*, that the issue or subsequent negotiation of the note is affected with fraud, duress, or force and fear, or illegality. *Ridgeway* v. *Dansereau*, Q. R. 17 S. C. 176.

4. Action on note—*Price of goods—Exorbitancy — Defence.*]—To an action founded on a promissory note the defendant cannot set up a defence going behind the instrument itself; he cannot plead that it was given in payment of goods sold at an exorbitant price. *Renaud* v. *Bougie*, Q. R. 16 S. C. 405.

5. Alteration in date.]—An alteration in the date of a promissory note by the payee, after signature, without the assent of the maker, does not avoid the instrument if it be made for the purpose of correcting a mistake and making the note as it was intended by all parties to be. *McLaren* v. *Miller*, 20 Occ. N. 392.

6. Cheque — *Action on — Pleading — Presentment and protest.*]—In an action on a cheque payable to order, brought by the indorsee, it is not necessary to allege that the cheque had been presented for payment within a reasonable time at the bank where it was payable, and that payment had been refused, and that the cheque had been protested for non-payment. *DeSenes* v. *Enard*, Q. R. 17 S. C. 199.

7. Company—*Powers of—Indorser.*]—The indorser of promissory notes signed by an incorporated company, who allege that the amount has been paid to the indorser and bring him in *en garantie* in an action upon such notes, cannot plead that the company was not authorised to sign such notes. *Ball* v. *Atlantic and Lake Superior R. W. Co.*, 3 Q. P. R. 315.

8. Consideration — *Illegality—Bankruptcy — Composition — Holder for value without notice.*]—A promissory note exacted by a creditor as a condition of consent to sign a deed of composition between the debtor and his creditors, the note representing the difference between this creditor's claim and the amount of the composition upon it, is void between the parties.—But this validity is only relative, and cannot be set up against one who derives his title to the note from a holder in due course who is ignorant of the fraud committed, even when the holder of the note has not himself given value and is only a *prête-nom* for the regular holder. *Bellemare* v. *Gray*, Q. R. 16 S. C. 581.

9. Consideration — *Inadequacy of—Fraud—Pleading.*]—To an action brought to recover the amounts due on three several promissory notes, the defendants pleaded an equitable plea. The Court, being of the opinion that the facts set up thereby disclosed such an inadequacy of consideration, accompanied by other circumstances, as would justify a jury in finding that there was fraud in the transaction, and that it was unconscionable, gave judgment for the defendants on demurrer. *Macpherson* v. *McLean*, 34 N. B. Reps. 361.

10. "Given for a patent right"—*Subsequent addition.*]—Every bill or note signed in consideration of the transfer of rights under a patent of invention must bear upon its face the words "given for a patent right" at the time the instrument is signed and issued by the promissor, and it will not suffice to write these words in afterwards, the note, without them, being absolutely void from the beginning. *Lefebvre* v. *Titemore*, Q. R. 16 S. C. 248.

11. Indorsers — *Recourse.*]— Every party to a bill or note has his recourse against every antecedent party. Successive indorsers are liable to each other

in the order of the indorsements. The obligation as between the parties is several and successive and not joint, whether the indorsements be made for accommodation or for value received, unless there be an agreement *aliunde* different from that evidenced by the indorsements. *McRae* v. *Lionais*, Q. R. 16 S. C. 262.

12. Indorsers—*Recourse.*]—The first indorser has no recourse against the subsequent indorsers, even when they have indorsed for accommodation, unless it appears by legal evidence that the last indorsers have assumed a different liability from that which arises according to the ordinary course of law. *Poisson* v. *Bourgeois*, Q. R. 17 S. C. 94.

13. Lost note—*Division Court—Ascertainment of amount—Limitation of actions—Absence beyond seas—Interest.*]—Action in a Division Court upon a promissory note made in 1882, to recover $167 and interest. The instrument was lost; secondary evidence of its contents was received, and it was shewn that it had been signed by the defendant. *Held*, that the amount was ascertained by the signature of the defendant so as to give the Division Court jurisdiction up to $200. *Held*, also, that the Statute of Limitations was not a bar to recovery, the defendant shortly after the making of the note having removed to the United States, and having never returned; and the action lay, notwithstanding that he was still abroad. *Held*, also, that the plaintiff was entitled to interest from the maturity of the note. *Murphy* v. *Sweeney*, 20 Occ. N. 338.

14. Payment to agent—*Authority to collect — Estoppel.*]—Actions on promissory notes made by the defendants respectively for the price of certain waggons, indorsed by the payee, before maturity and for valuable consideration, to the plaintiffs.

The only defence pleaded was payment to O., the payee, who was, as the defendants alleged, the agent of the plaintiffs to collect the amounts of the notes.

It was admitted that O. was the agent to sell and had sold the waggons, and it was proved that many persons had previously paid O. money, and that the plaintiffs had received money from O. from time to time as it had come into his hands, but it was not shewn that the defendants knew of this last circumstance so as to be led by it to make payments to O. It was proved that O. had not remitted to the plaintiffs the money paid to him by the defendants. In the first case one of the payments relied on consisted in the taking by O. of a lease at the valuation of $20, to be credited on the notes.

Held, that the plaintiffs being the legal holders and having the notes in their possession, in the absence of direct authority to the agent to collect, or of estoppel, the defendants were liable.

Held, also that, even if the defendant P. was justified in thinking that O. was authorized to collect money for the plaintiffs, the horse transaction could not be regarded as equivalent to a payment. *McLaughlin Carriage Co.* v. *Pettipas*, *McLaughlin Carriage Co.* v. *Haverstock*, 20 Occ. N. 137.

15. Several makers—*Joint or several liability.*]—The obligation of the makers of a promissory note which is not expressed to be the several note of each, is joint only. *Noble* v. *Forgrave*, Q. R. 17 S. C. 234.

16. Transfer as collateral security—*Recovery by transferee—Extent of.*]—Whenever persons assume the character of duly authorized mandatories of another, they must prove their mandate or indemnify third parties against the consequence of its absence.—2. When a promissory note is transferred as collateral security for the payment of a principal debt, the transferee of said note has not a recourse against the maker for any amount above what is due on said principal debt. *Letellier* v. *Boivin*, Q. R. 16 S. C. 428.

See ARREST, III. 6—BANKRUPTCY AND INSOLVENCY, III. 2, 4 — BANKS AND BANKING—CONTRACT, IV. 3 — EXECUTORS AND ADMINISTRATORS, 4—GAMING —HUSBAND AND WIFE, V. 4, VII. 1—INSURANCE, VI. 5—LIMITATION OF ACTIONS, 11—PLEADING, II. 4, IX. 3, 4—SET-OFF, 2—WILL, I. 9.

BILLS OF COSTS.

See COSTS—SOLICITOR, V. — STATUTES, V. 3.

BILLS OF LADING.

See PLEADING, V. 1—SHIP, 1, 2.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. Affidavit of bona fides—*Execution—Fraudulent assignment.*]—The Bills of Sale Ordinance makes necessary an affidavit "that the sale is * * * not for the purpose of holding or enabling

the bargainee to hold the goods * * * against *any* creditors of the bargainor."

Held, that the use of the words "*the* creditors" instead of *any* creditors" in the affidavit of bona fides did not invalidate the bill of sale.

The same Ordinance makes necessary an affidavit "of a witness thereto of the due execution thereof."

Held, that, as attestation is not made essential to the validity of a bill of sale, it is not necessary to call the attesting witness to prove the execution thereof.

Held, also, on the evidence, that, inasmuch as the trial Judge could reasonably find, as he had, that there was no fraudulent intent on the part of the bargainee, the bill of sale could not be held void as being made with intent to defraud creditors of the bargainor, and that, inasmuch as the trial Judge could reasonably find, as he had, that the bargainee was not in fact a creditor of, but a bona fide purchaser from, the bargainor, the bill of sale could not be held void as being made with intent to give, or as having the effect of giving, a preference to one creditor over another, and that therefore the bill of sale was not void under the Ordinance respecting preferential assignments. *Emerson* v. *Bannerman*, 1 Terr. L. R. 224.

Affirmed 19 S. C. R. 1.

2. Buildings — *Appurtenances of ferry —Remedy—Detinue—Estoppel.*]— The defendant gave a chattel mortgage to the plaintiffs on certain buildings, and also a certain ferry, and "the ferry boat with cables, pulley, and other machinery used therewith."

Held, that detinue or replevin would not lie for the buildings, at least where the defendant was in possession of the land on which they stood: nor for the ferry boats or attachments, as they were appurtenant to the ferry, which was an easement arising in respect of land.

(2) That there was no estoppel by the mortgage, in such sense as to make detinue or replevin an appropriate remedy for property of the character in question. *Stimson* v. *Smith*, 1 Terr. L. R. 183.

3. Description — *Renewal — Time.*]— Goods were described in a chattel mortgage as follows:—"All and singular the goods, chattels, stock-in-trade, fixtures, and store building of the mortgagors used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise, now being in the store of the said mortgagors on," etc.

Held, Rouleau, J., dissenting, that the description was sufficient.

The mortgage was filed 12th August, 1886, at 4.10 p.m.; a renewal was filed 12th August, 1887, at 11.49 a.m.

Held, Rouleau, J., dissenting, that the renewal was filed within one year from the filing of the mortgage. *Quirk* v. *Thompson*, 1 Terr. L. R. 159.

4. Description — *Sufficiency—Cattle—Identification—Situation—License to mortgagor to sell cattle — Contemporaneous agreement—Consideration.*]—In a chattel mortgage the property was described as follows:—"All cattle and horses of whatever age and sex branded '3' on the left side and all increase thereof from time to time until the moneys hereby secured are fully paid, together with the '3' brand and the branding irons for said brand, and all right, title, and interest therein and thereto." *Held*, a sufficient description. For the purpose of identification it was not necessary that *all* the brands borne by each animal should be referred to.—*Held*, also, that the mention of the locality where the cattle were when the mortgage was made was unnecessary.

The mortgage in question contained the following proviso: "Provided always, anything hereinbefore contained to the contrary notwithstanding, that the said mortgagors shall be at liberty at any time to sell bulls and steers." *Held*, that this power was restricted to sales authorized by a contemporaneous agreement between the mortgagor and mortgagee, viz., of such animals as it might become necessary to sell to pay running expenses.

Held, also, upon the evidence, that the consideration was duly expressed in the mortgage. *Graveley* v. *Sprenger*, 20 Occ. N. 148.

5. Hire receipts—*Transfer of rights—Conditional sales — Subrogation.*]—The purchaser of a piano under a hire receipt, by which, on his completing certain payments on account, the property was to pass to him, but in the meanwhile to remain in the vendors, before he had paid the required sum, agreed with his wife that she should purchase his interest and pay the balance due the vendors. There was no bill of sale registered, nor such change of possession as required by the Bills of Sale and Chattel Mortgage Act, R. S. O. c. 148.

Held, that the transaction was invalid as against execution creditors, under s. 37 of that Act; and that the transaction was not within s. 41, s.-s. 4, which was intended to except only conditional sales of chattels, within R. S. O. c. 149.

Held, however, that the wife was entitled to be subrogated to the rights of the vendors of the piano to the extent of the payments made by her. *Eby* v. *McTavish*, 20 Occ. N. 376, 32 O. R. 187.

6. Husband and wife — *Creditors—Fraudulent conveyance — Description of goods—Affidavit—Mistake in recital—After-acquired property.*]—F., the husband of the plaintiff, in 1895 gave to C. a chattel mortgage upon a livery stable stock, described as eight horses and harnesses now in livery stable owned by F., six waggons in storehouse, four pungs, coach harness, buffaloes, and robes now in said stable, and upon property which might be substituted for or added to such stock. In March, 1896, F., being indebted to the plaintiff to the extent of $600 and upwards, gave her a chattel mortgage in which the property conveyed was described in almost the same words as in the mortgage to C., but the schedule, after enumerating specifically a number of articles, concluded as follows: "Also all other goods * * * now or hereafter during the continuance of these presents used in connection with the livery stable * * * and all property hereafter acquired therein. In July, 1896, C. assigned his mortgage to the defendant, but the assignment was silent as to after-acquired property. In September, 1896, F. gave a further chattel mortgage to the defendant, covering all the property he had mortgaged to the plaintiff, and shortly afterwards handed him a delivery order authorizing the defendant to take possession of everything connected with the livery stable business, which he did. The plaintiff had also given to her husband $100 with which he was to buy her a phaeton. Without her knowledge, he bought her one on credit for $100, which she accepted. This, though not mentioned in any of the mortgages, was seized by the defendant. The mortgage to the plaintiff was first drawn to secure $500, but before execution it was changed to $600 in every place except in the recital, where the word "five" was inadvertently left. In an action for the conversion of the phaeton and all the property conveyed to the plaintiff except such as was covered by the mortgage to C.:—

Held, 1. That the mortgage was not invalid by reason of its having been made by the husband directly to the wife.

2. That there was no evidence that it was made to delay or hinder creditors.

3. That it contained a sufficient description of the mortgaged property to satisfy the Bills of Sale Act (1893); and that there was no such untrue statement in the affidavit attached to the mortgage as would invalidate it, the evidence affording a satisfactory explanation of the mistake in the recital.

4. That it was sufficient to cover after-acquired property.

5. That it was not bad under 58 V. c. 6.

6. That the mortgage to C. and the assignment thereof to defendant were insufficient to cover after-acquired property.

7. That the circumstances under which the phaeton buggy was purchased made it the separate property of plaintiff, and as such not liable to seizure by defendant. *Fraser* v. *Macpherson*, 34 N. B. Reps. 417.

See ASSESSMENT AND TAXES, II. 1—BANKRUPTCY AND INSOLVENCY, III. 1—MINES AND MINERALS, I. 3.

BOARD OF DELEGATES.

See APPEAL, VIII. — MUNICIPAL CORPORATIONS, III. 2.

BOARD OF EXAMINERS.

See PROHIBITION, IV. 2.

BOND.

See ABSCONDING DEBTOR, 1 — APPEAL, XV. 1 — PARTICULARS, II. 6—RAILWAYS AND RAILWAY COMPANIES, I. —REPLEVIN, 1.

BONUS.

See ASSESSMENT AND TAXES, VII. 3—MUNICIPAL CORPORATIONS, IV. 1—RAILWAYS AND RAILWAY COMPANIES, I.

BOUNDARIES.

See MINES AND MINERALS, I. 2—SCHOOLS, 1, 2, 3—STAY OF PROCEEDINGS, 2.

BREACH OF PROMISE OF MARRIAGE.

See HUSBAND AND WIFE, IV.—INFANT, III. 1.

BRIBERY.

See BANKRUPTCY AND INSOLVENCY, III. 3.

BRIDGES.

See CROWN, II. 3 — MUNICIPAL CORPORATIONS, III. — RAILWAYS AND RAILWAY COMPANIES, II.

BROKERS.

Stockbroking transactions—*"Commercial matters"—Commencement of proof in writing—Notice to produce — Authority to brokers—Stock Exchange terms.*]—In an action by stockbrokers against their principal to recover the balance of their account in respect of sales and purchases of shares for private speculation on his account:—Held, that these transactions were "commercial matters" within Art. 1233, C. C., which the plaintiffs might prove by oral evidence; and that a plaintiff was a competent witness under s. 2 of 54 V. c. 45.—2. An admission by the defendant in his deposition that he employed the plaintiffs as his stockbrokers, and that they bought and sold something for him, is a sufficient commencement of proof in writing under Art. 1233 (7) to let in oral evidence of the particulars.—3. Art. 1233 (6) authorizes reception of secondary evidence of bought and sold notes in possession of the adverse party without a notice to produce: and an objection thereto not taken at the trial cannot be taken in appeal.—4. The defendant in giving authority to the plaintiffs to do business on the stock exchange must be taken, in the absence of evidence to the contrary, to have employed them on the terms of the Stock Exchange, and therefore to have authorized the sale of his shares on failure to supply them with the requisite funds. *Forget* v. *Baxter*, [1900] A. C. 467.

See CRIMINAL LAW, III. 3—PRINCIPAL AND AGENT, 5.

BUILDER'S PRIVILEGE.

See MECHANICS' LIENS, III.

BUILDINGS.

See BILLS OF SALE AND CHATTEL MORTGAGES, 2 — LANDLORD AND TENANT, VI. 1 — MUNICIPAL CORPORATIONS, IV. 3, VI. 2, XII.

BY-LAWS.

See MUNICIPAL CORPORATIONS, IV.

CALLS.

See COMPANY, II. 4.

CANADA TEMPERANCE ACT.

1. Fourth conviction—*Imprisonment—Release on bail—Re-arrest—Process—Discharge.*] — D. was originally imprisoned under a warrant of two justices on a conviction for a fourth offence against the provisions of the second part of the Canada Temperance Act. He applied for an order for his discharge to a Judge, who referred the matter to the Court for advice, bailing the prisoner to appear on a day certain in term, to submit to whatever order the Court might make. The Court, by a majority of its members, advised the Judge that D. was legally imprisoned and to refuse the application. D. appeared on the day and at the place mentioned in his recognizance before the Judge, sitting as the Court, who made an order recommitting D. to gaol, "there to remain until discharged according to the condition of the said warrant" (original warrant of justices) "and according to the condition of the recognizance and the course of the Court."

D. was by consent of counsel allowed to go at large from Saturday until Tuesday, on which day he surrendered himself to the gaoler, who refused to take or retain him. On the following day D. was arrested by a provincial constable on the order of the Court, without any process, and lodged in gaol.

Held, that the Judge had no power on the first application to bail D., as there were not any facts upon which the Judge had any doubts, the grounds of the application being matters of law, and there being no facts the truth or falsity of which were to be pronounced upon.

If the Judge could order the bailing of D., no order was made by the Court, as the matter was referred back to the Judge, and any order he made should have been under his hand. Assuming that the Judge was right in making the order as an order of the Court, D. being at large could not be arrested on the order without a process of the Court to enforce it. *Ex p. Doherty*, 20 Ont. N. 20.

2. Police magistrate—*Disqualification—Interest in fines—Bias—Imprisonment—Distress.*]—Both the police and the sitting magistrate for the city of M. were residents and ratepayers thereof, and the police magistrate was in receipt of a fixed salary from the city as city court commissioner. Fines imposed for violation of the Canada Temperance Act

therein were paid over to the treasurer of the city, by him placed to the credit of its general funds, and used to meet unforeseen expenses. The city, by one of its policemen employed for the purpose of enforcing the Act, was the prosecutor in all the cases.

Held (Hanington, J., *dissentiente*, and Landry, J., *dubitante*), that there was no disqualification of either the police or the sitting magistrate by reason of pecuniary interest, nor was there such a probability of bias on the part of either by reason of their being corporators of the city, which was the virtual prosecutor, as to invalidate convictions made by them for violations of the Canada Temperance Act in the said city of M.

Ex p. Driscoll, 27 N. B. Reps. 216, considered.

Section 872 of the Criminal Code, 1892, allows imprisonment without the awarding of distress. *Ex p. Gorman*, 34 N. B. Reps. 397.

3. Police magistrate — *Disqualification—Litigation with husband — Bias.*]—A *bona fide* action brought by the husband of a defendant against a stipendiary magistrate, before whom an information is laid for a violation of the second part of the Canada Temperance Act, is sufficient to disqualify him.

Ex p. Scribner, 32 N. B. Reps. 175, distinguished. *Ex p. Gallagher*, 34 N. B. Reps. 413.

4. Search warrant—*Execution by informant—Order for destruction of liquors.*] —One B. laid an information before the stipendiary magistrate for Moncton under the provisions of the Canada Temperance Act, and obtained a warrant to search the premises of the applicant, which he executed himself, and took the liquor seized before the magistrate. Subsequently, on the information of B., the applicant was convicted before the magistrate of unlawfully keeping the liquor for sale, and the liquor seized was condemned and its destruction ordered, which order was executed by B. *Held*, on an application for a *certiorari* to remove the order for condemnation and destruction, that the informant could not lawfully execute his own warrant, and that the liquor was not lawfully before the magistrate, and the order for destruction was void. *Ex p. McCleave*, 20 Occ. N. 89.

5. Statute — *Construction of — Imperative or permissive — Penalty.*]—There having been numerous convictions of the respondent, with accumulated penalties, amounting to $1,400, for having on various occasions sold intoxicating liquor, and thereby committed offences under the Canada Temperance Act of 1864, a certiorari was granted in one case by the Superior Court, on the ground that, by the true construction of s. 17, which provides that two or more offences by the same person may be included in the same complaint, a penalty of $100 was sufficient for all offences under the Act during the limitation period of three months prescribed by s. 15:—*Held*, that, in the absence of express words to that effect, s. 17 must be construed as permissive merely, and not imperative. *Wentworth* v. *Mathieu*, [1900] A. C. 212.

CANALS.

See CROWN, I. 1.

CANCELLATION OF LEASE.

See LANDLORD AND TENANT, V.

CAPIAS.

See ARREST — BANKRUPTCY AND INSOLVENCY, III. 5 — HUSBAND AND WIFE, IV.

CARRIAGE OF GOODS.

See RAILWAYS AND RAILWAY COMPANIES, III.—SHIP.

CARRIERS.

See COURTS, VI. 4—FERRY, 2 — RAILWAYS AND RAILWAY COMPANIES, III.—SHIP.

CAUTION.

See EXECUTORS AND ADMINSTRATORS, 4.

CAVEAT.

See REGISTRY LAWS, II. 2.

CERTIORARI.

1. Application for—*Forum—Conviction under Masters and Servants' Act.*]—An order under the Masters and Servants' Act, R. S. M. c. 96, for payment of wages was made by a justice of the peace.

On a motion for a *certiorari* the question was raised whether the matter was one of a quasi-criminal nature, or on

the Crown side of the Court, which should be brought before the full Court, or one which could be brought before a single Judge.

The Court was not at first disposed to consider that the matter was in any sense a criminal matter, but, in view of such opinions as those expressed in *Seaman* v. *Burley*, 75 L. T. 91, *Payne* v. *Wright*, 66 L. T. 148, and *Ex p. Schofield*, 64 L. T. 780, was of opinion that the question deserved further argument.

A matter of this kind in which only a small sum is involved should not be delayed for the time that would be necessary if the motion for a certiorari were argued before the full Court, and it would be best to adjourn the motion into Chambers if the parties were willing; otherwise to dismiss it without prejudice to a motion in Chambers.

By consent the matter was adjourned into Chambers. *In re Dupas*, 20 Occ. N. 23, 12 Man. L. R. 653.

2. Court for small causes—*Absence of commissioner.*]—For one of the commissioners sitting for the summary decision of small causes to concur in the judgment without having heard the evidence is a grave irregularity, and warrants the issue of a writ of *certiorari*. *Caron* v. *Clement*, 2 Q. P. R. 391.

3. Harbour commissioners—*Pilot's license—Appeal.*] — A writ of *certiorari* may issue to remove a sentence or conviction of a pilot by the Montreal Harbour Commissioners. The appeal to the Court of Queen's Bench, Crown Side, provided in s. 879 of the Criminal Code of Canada, does not extend to or cover a conviction by the Harbour Commissioners depriving a pilot of his license. *Arcand* v. *Harbour Commissioners of Montreal*, Q. R. 17 S. C. 497.

4. Harbour commissioners—*Conviction of pilot — Irregularities—Waiver—By-laws—Proof of.*]—A writ of *certiorari* may issue to remove a conviction of a pilot by the Montreal Harbour Commissioners for the violation of a by-law.

2. A pilot, by appearing, pleading, and attending the investigation of a complaint against him, is held to waive irregularities of service, etc., before conviction, which appear on the face of the record.

3. A copy of the by-laws of the Harbour Commissioners, certified as a true copy under the hand and seal of the secretary, is sufficient, to the extent it covers; but, *semble*, proof should also be made of approval by the Governor-in-Council and of publication in the *Canada Gazette*.

4. Under the Pilotage Act, R. S. C. c. 80, and the Montreal Harbour Commissioners Act, 57 V. c. 48, the commissioners are authorized to pass a by-law which will make it an offence for a pilot, who is selected for service with one transatlantic line, to handle more than thirty vessels of that line during the season, or to take service on any vessel of another line; but the by-law in question in the present case merely stating that "no pilot making such agreement shall * * * *be entitled* to any duty as pilot by turn or in rotation," did not actually prohibit the act mentioned.

5. The conviction in this case, as signed, was irregular, inasmuch as it imposed an imprisonment of one month unless the costs of distress and commitment were sooner paid, whereas by the judgment of the pilotage committee the only penalty imposed on the petitioner was that he be fined $20 without costs. *Perrault* v. *Harbour Commissioners of Montreal*, Q. R. 17 S. C. 501.

5. Peremption—*Time.*]—The writ of *certiorari* is the commencement of the proceeding, and therefore a proceeding upon *certiorari* cannot be declared barred before the expiration of two years from the date of the last step in the proceeding. *Allan* v. *Weir*, 3 Q. P. R. 163.

6. Recognizance—*Affidavit of justification—Rule of Court.*]—A Rule of Court required that no motion to quash a conviction should be entertained unless the defendant were shewn to have entered into and deposited a recognizance in $300 with one or more sufficient sureties, or to have made a deposit of $200. On a motion to make absolute a rule *nisi* to quash a certain conviction, a recognizance had been entered into and deposited, but without an affidavit of justification of the sureties or other evidence of their sufficiency.

Held, following *Regina* v. *Richardson*, 17 O. R. 729, that the Rule of Court had not been complied with, and therefore the rule must be discharged.

But $200 having been deposited a day or two before the return day of the rule *nisi*, with the view of complying with the Rule of Court:—*Held*, that the ends of justice would be served by allowing the applicant to take a new rule *nisi* in the terms of the one discharged, and this privilege was accordingly granted. *Regina* v. *Petrie*, 1 Terr. L. R. 191.

See COURTS, III.—CRIMINAL LAW. IX. 1, 7—JUSTICE OF THE PEACE. 3—LIQUOR LICENSE ACT, I., III., V. 1—MUNICIPAL CORPORATIONS. IV. 2—SUNDAY. 1.

CHARGE ON LAND.

See ANNUITY.

CHARTER PARTY.

See SHIP.

CHEQUE.

See BANKS AND BANKING, 1—BANKRUPTCY AND INSOLVENCY, III. 4—BILLS OF EXCHANGE AND PROMISSORY NOTES, 6.

CHOSE IN ACTION.

1. Assignment of—*Beneficial interest—Action by assignee—Interest of debtor.*]—The plaintiffs sued to recover for goods sold by them and P. & Co. and C. & Co., the claims of the latter firms having been assigned to the plaintiffs to avoid bringing two other actions. The defence raised the objection that the claims assigned to the plaintiffs were merely held in trust by them and that the plaintiffs were not beneficially entitled thereto or interested therein; (2) that the plaintiffs, being a corporation under the Joint Stock Companies Act, were not empowered to become assignees and could not sue for claims other than their own.

Held, that under the Assignments Act, R. S. M. c. 7, s. 3, the assignee of debts and choses in action may bring an action thereon in his own name, although they have been transferred only for the purpose of joining a number of claims in one suit, and the assignee has no beneficial interest in them.

2. That the defendant had no interest whatever in the assignments, and was in no way prejudiced by them; he was a mere stranger to the assignments, and not competent to raise the point in question. *Stobart* v. *Forbes*, 20 Occ. N. 446.

2. Assignment of — *Consideration — Stifling prosecution.*]—An assignment of a chose in action made to the complainant for the purpose of causing the withdrawal of a criminal charge against a relative of the assignor is void, although valuable consideration may be given for a part of the subject of the assignment. *Frigon* v. *Cossette*, Q. R. 16 S. C. 340.

3. Assignment of — *Partnership — Authority of partner — Pleading—Objection —Costs.*]—The plaintiff sued as assignee of a firm, creditors of the defendant. The transfer was signed by S. M. L., and a copy of it sent to the defendant. The defendant pleaded, denying, among other things, the validity of the transfer. In reply, the plaintiff alleged that S. M. L. was one of the members of the firm and had all the rights and authorization of the firm. *Held*, that this reply was good in law, but the matter of it should have been set up in the declaration. The objection of the defendant should have been taken by way of exception to the form, and not by demurrer. The demurrer was disposed or by ordering *preuve avant faire droit*, reserving costs. *D'Arcy* v. *Hughes*, 2 Q. P. R. 492.

4. Assignment of—*Right of action.*]—A person to whom debts and choses in action have been assigned by an instrument in writing may, under the Assignments Act, R. S. M. c. 1, s. 3, bring an action thereon in his own name against the debtor, although they have been transferred to him only for the purpose of joining a number of claims in one suit, and he has no beneficial interest in them. *Wood* v. *McAlpine*, 1 A. R. 234, distinguished. *Mussen* v. *Great North-West Central R. W. Co.*, 19 Occ. N. 117, 285, 12 Man. L. R. 574.

5. Equitable assignment — *Order—Specific fund.*] — The Dominion Government was indebted to B. for transport services rendered during the N.-W. Rebellion. On the 25th July W., a Government transport officer, notified B. by letter to put in his account, certified, to the H. B. Co., Winnipeg, "where it will be paid."

B., being indebted to the plaintiffs, wired them on the 1st August: "Will send order on transport account, payable in Winnipeg." B. also wrote to the plaintiffs 4th August, enclosing a copy of W.'s letter, and an order reading: "4th August. To the H. B. Co., Winnipeg. Please pay Messrs. G. F. & J. Galt or order amount of my account."

This order was presented to the company, but payment was refused for the reason assigned that the Government had stopped payment of transport accounts.

Subsequently B. made a general assignment for the benefit of his creditors to the defendant, to whom the Government eventually paid the amount of B.'s claim. The plaintiff sought to recover the amount from the defendant, as money had and received to their use.

Held, that the order *per se* did not constitute an equitable assignment.

Held, McGuire, J., *dissenting*, that the order in conjunction with the other documents, could not operate as an equitable assignment, because the evidence did not shew that the company either were debtors to B. or held a specific fund to which he was entitled. *Galt* v. *Smith*, 1 Terr. L. R. 129.

CHURCH.

1. Change in doctrine—*Secession of members — Possession of land — Religious*

Institutions Act—Trust.]—Land was conveyed to certain persons in trust for a religious body called the United Brethren in Christ, and a congregation was organized and a church built. Subsequently a division took place in the religious body, and it was held, in *Itter* v. *Howe*, 23 A. R. 256, 16 Occ. N. 158, that the party to which the congregation in question adhered were seceders. This congregation continued to use the church, and, some of the original trustees having died, appointed new trustees to act with the survivors, and these trustees refused to give up possession to the representatives of what had been declared to be the true body.

Held, that the trustees must be treated as being trustees for the true body, who were entitled to enforce the trust and to have possession of the church, and that it was not necessary to organize another congregation and appoint new trustees for that congregation under the Religious Institutions Act.

Judgment in 19 Occ. N. 218, reversed. *Brewster* v. *Hendershot*, 20 Occ. N. 201, 27 A. R. 232.

2. Right to pew—*Parties—Intervention—Interest.*]—A parishioner and pewholder has no interest entitling him to intervene in an issue between another parishioner asking to be put in possession of a pew, of the one part, and the *curé* and churchwardens, of the other part, in support of the plaintiff's demand; the interest of the intervener appearing rather to be the same as that of the *curé* and churchwardens; such an intervention will be dismissed upon demurrer. *Bédard* v. *Monette*, 2 Q. P. R. 501.

CIRCUIT COURTS.

See COURTS, VI.

CLUB.

See GAMING.

CODE OF PROCEDURE, QUEBEC.

See PEREMPTION, 3, 4, 5.

COLLATERAL SECURITY.

See BANKS AND BANKING, 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, 16.

COLLISION.

See NEGLIGENCE, 1.

COLLUSION.

See FRAUDULENT CONVEYANCE, 4.

COMMISSION.

See EVIDENCE, V. — PRINCIPAL AND AGENT, 1, 4, 5—TRUSTS AND TRUSTEES, 2.

COMMON.

See MUNICIPAL CORPORATIONS, V.

COMMUNITY.

See HUSBAND AND WIFE, V.

COMPANY.

I. DIRECTORS AND OFFICERS.
II. INSOLVENCY AND WINDING-UP.
III. POWERS OF.
IV. PROCEEDINGS AGAINST.
V. PROMOTERS.
VI. SHARES AND SHAREHOLDERS.

See ASSESSMENT AND TAXES, V. 1—ATTACHMENT OF DEBTS, I. 3, 6—BILLS OF EXCHANGE AND PROMISSORY NOTES, 7—COSTS, IV. 8, 9—INSURANCE—JUDGMENT, I. 3—MUNICIPAL CORPORATIONS, XVI. 4—PARTNERSHIP, III. 1 — RAILWAYS AND RAILWAY COMPANIES—REGISTRY LAWS, II. 2 — VOLUNTARY ASSOCIATION—WRIT OF SUMMONS, V. 2, 3.

I. DIRECTORS AND OFFICERS.

1. Election of president—*Meeting—Legality—Quo warranto—Provisional director—Pleading — Shareholders.*]—A person who is sued for having usurped a public office is entitled to plead that the meeting at which he was elected was legal and regular, and can set up the illegality of the meeting at which the election relied upon by the plaintiff took place.

2. The fact that a meeting of a company at which an election took place was called by one provisional director only, would not necessarily render such election absolutely and radically null.

so as to justify the rejection of a paragraph alleging such election, in answer to a *quo warranto*.

3. If a fact, which appears to be legal and relevant, is set up at great length in a pleading, and the opposite party inscribes in law, not against the parts of allegations containing such useless details, but against the fact itself, which he alleges should not have been pleaded, the useless details will not be struck off on such inscription.

4. When parties sue for usurpation of office, not in any particular quality, but in their own names, and allege in their pleading their quality as shareholders and their interest as such, allegations of the defence denying such quality and interest will not be rejected upon an inscription in law. *Caisse Générale* v. *Dupuis*, 2 Q. P. R. 478.

2. Invalid resolution — *Payments to officers.*]—By the by-laws of a publishing company the board of directors was to consist of three persons, two of whom constituted a quorum. At a meeting, at which two of the directors, C. and G., were present, one being the president and the other the secretary of the company, a resolution was passed that "the matter of the compensation of C., the editor, and G., the advertising solicitor of the company, was considered, and the sum of $1,000 each ordered to be placed to their respective credits in the books of the company for services rendered during the year 1895, in addition to their regular salary, and to be charged to their salary account." C. as a matter of fact had not been appointed editor, nor G. advertising solicitor, the object of the resolution being to appropriate all the funds of the company, and to prevent a stockholder, who owned the greater part of the stock, and had made a claim against the company, being paid.

Held, that the resolution could not be sustained, nor could any moneys received under it be retained. *Gardner* v. *Canadian Manufacturer Publishing Co.*, 20 Occ N. 174, 31 O. R. 488.

See II. 1.

See also CONSTITUTIONAL LAW, 5—CONTRACT, I. 10—MINES AND MINERALS, II. 5—RAILWAYS AND RAILWAY COMPANIES, I.

II. INSOLVENCY AND WINDING-UP.

1. Assignment for creditors—*Officers—Wages — Priority.*]—Claims for arrears of salary, made by persons occupying the positions of president and vice-president of a company, such salary being made payable under resolutions duly passed therefor, are valid; and upon the liquidation of the company are payable in priority to the claims of the general body of creditors. *Fane* v. *Langley*, *Lavinder* v. *Langley*, 20 Occ. N. 9, 31 O. R. 254.

2. Foreign company—*Conflict of laws—Assets in Manitoba—Garnishment—Jurisdiction.*]—A debt owing by a resident of this Province to a foreign corporation, though payable at its place of business in a foreign state, is nevertheless an asset of such corporation in Manitoba within the meaning of Rule 196 (*h*) of the Queen's Bench Act, 1895, as added to by 61 V. c. 13, so as to give the Court jurisdiction to entertain an action which could not otherwise be brought in this Province.

Blackwood v. *The Queen*, 8 App. Cas. 82. *Commissioner of Stamps* v. *Hope*, [1891] A. C. 476, and *In re Maudslay*, [1900] 1 Ch. 602, followed.

But when proceedings in bankruptcy had been commenced against the foreign corporation and a temporary receiver of all its assets appointed before the commencement of the action here, in which a garnishing order had been made attaching such debt, it was held that such debt had ceased to be an asset in Manitoba such as would confer jurisdiction on the Court in the action under the above mentioned Rule, and that the action should be dismissed with costs.

It is an established principle of English law that the attachment or assignment by involuntary proceedings under the bankruptcy laws of a foreign country in which a bankrupt is domiciled affects or transfers the title to his purely personal property in England, unless the rights of citizens under some special statute are prejudicially affected; and such principle should be adopted here.

In re Oriental Island Steam Co., L. R. 9 Ch. 557, and *Sill* v. *Worswick*, 1 H. Bl. 665, followed.

Held, also, that, at the commencement of the action, the company had no assets in Manitoba which might be rendered liable to any judgment to be recovered, because the debt attached was not one which the defendant could properly at that time, and without violating the rights of others, deal with. *Roberts* v. *Death*, 8 Q. B. D. 319, *Badeley* v. *Consolidated Bank*, 38 Ch. D. 238, and *Bertrand* v. *Heaman*, 11 Man. L. R. at p. 208, followed. *Brand* v. *Green*, 20 Occ. N. 279, 13 Man. L. R. 101.

3. Winding-up — *Assignment — Discretion.*]—Where the insolvency of the company is admitted, the Court has no discretion under s. 9 of the Winding-up Act, R. S. C. c. 129, to refuse to grant a winding-up order on the petition of a

creditor who has a substantial interest in the estate, although the company has made a voluntary assignment for the benefit of its creditors, and most of them are willing that the winding-up should be under such assignment.

Wakefield Rattan Co. v. *Hamilton Whip Co.*, 24 O. R. 107, not followed. *In re William Lamb Manufacturing Co. of Ottawa*, 32 O. R. 243.

4. Winding-up — *Calls—Enforcement of order of Court of another Province—Married woman—Collection Act.*]— Application for a *certiorari* to remove proceedings of commissioners under the Collection Act, 1894.

Under a Rule of Court in respect to the winding-up of insolvent companies, it was prescribed that an order for the payment of calls should have the same effect as a judgment for the payment of money, and should be entered as a judgment by the prothonotary.

In this case the order of the High Court of Ontario had been simply filed with the prothonotary.

Held, that this would not have been sufficient even if the order had been an order of the Supreme Court of Nova Scotia.

Semble, that, as this order was against a married woman, the Court would not have power to enforce it except against her separate estate.

Quære, whether the Collection Act applied to such a case. *In re Cunningham*, 20 Occ. N. 47.

5. Winding-up—*Mortgage to creditor —Setting aside — Insolvency — Knowledge —"May be set aside"—Presumption—Rebuttal.*]—A mortgage of land made by an incorporated company in favour of a creditor within thirty days prior to the beginning of winding-up proceedings was attacked by the liquidator as being void under some of the provisions of ss. 68 to 71, inclusive, of the Winding-up Act, R. S. C. c. 129.

Held, notwithstanding the fact that the mortgage was given upon demand of the mortgagee, that the transaction must be avoided under s. 69, the mortgage being a conveyance for consideration, respecting real property, by which creditors were injured or obstructed, made by a company unable to meet its engagements; and it was not material under this section whether the mortgagee was or was not ignorant of such inability; but the transaction, being within the thirty days, was voidable, and should therefore be set aside, that being the effect of the words "may be set aside."

Held, also, that the words of s. 69, "upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court orders," were not applicable to the giving of a mortgage as security for a past debt.

Held, also, that none of the other sections relied on applied so as to avoid the mortgage; and, following *Lawson* v. *McGeoch*, 22 O. R. 474, 20 A. R. 464, and distinguishing *Webster* v. *Crickmore*, 25 A. R. 97, that the presumption referred to in s. 71 is rebuttable. *Kirby* v. *Rathbun Co.*, 20 Occ. N. 333, 32 O. R. 9.

6. Winding-up — *Taxes and water rates—Claim on estate — Distress.*]— The company owned its business premises, subject to a mortgage to A., who commenced an action for foreclosure. Upon a winding-up order being made, A. filed his claim, and the liquidators, under s. 62 of the Winding-up Act, with the approval of the Court, consented to his taking the property, and also consented to judgment for immediate foreclosure in the action.

Subsequently the city corporation filed with the liquidators a claim for arrears of taxes and water rates.

Held, as to the taxes, that the only remedy which the corporation had was to apply to the Court under s. 16 of the Act for leave to distrain. Upon such an application the Court would have determined whether the circumstances were such as to induce it to grant such leave.

If the distress in this case had been levied before the beginning of the winding-up, the Court would, there being no right of action for the taxes, have preserved to the company the right of distress, on the principle that where there is not a right of action, and therefore no privity between the parties, the distrainor may pursue his only remedy (distress) as if no liquidation existed: but where a right of action exists, even though there is also a right to distrain, then the creditor is within the Act, and must prove as an ordinary creditor.

The provisions of the final clause of s.-s. 1 of s. 135 of the Assessment Act with regard to goods in the hands of a liquidator apply only to proceedings under the Joint Stock Companies Winding-up Act.

By 35 V. c. 80, s. 11, power is given to fix rates which an owner shall pay, and such rates, if unpaid, are to be a lien or charge upon the real estate, but by s. 13 a personal liability to pay the rates is created against the owner. The city corporation, by by-law passed in 1890, fixed the insolvent company's water rates, and had assessed it by name from year to year since.

Held, that a liability to pay was thereby imposed, and this liability is a sufficient foundation for a valid claim by the corporation to rank on the estate in the hands of the liquidator for the

amount of the water rates. The corporation are not bound to prove as secured creditors, notwithstanding their lien upon the property arising under s. 11, because the lien is upon property in which the insolvent company is not interested, having already surrendered it to a prior mortgagee, and the liquidator could not give it up to the claimant as required by s. 62 of the Winding-up Act. *In re Ottawa Porcelain and Carbon Co.*, 20 Occ. N. 179, 31 O. R. 679.

See LOCAL JUDGES AND MASTERS, 2.

III. POWERS OF.

1. Abuse of powers—*Forfeiture—Informant—Security—Pleading— Irregularity —Exception.*]—In a suit by the Attorney-General against a company for a declaration of forfeiture of its corporate rights on account of the abuse of its powers, it is sufficient to give the name of the informant and the amount of the security furnished in the petition, to which the information drawn up refers, without reciting the facts anew. If there were an irregularity in this respect, it would be the subject of an exception to the form, and not of a demurrer. *Archambeault* v. *St. Lawrence Investment Society*, 2 Q. P. R. 519.

2. Incorporated agricultural society—*Borrowing—Mortgage — Ultra vires —Statutes—Real Property Act.*]—An agricultural society incorporated under the Agricultural Societies Act, 55 V. c. 2 (Man.), has no implied power to borrow money or to mortgage real estate belonging to it, notwithstanding the provisions of s. 9 of the Act; and a district registrar was right in declining to register a mortgage of such a society given to secure a loan of money to erect buildings on its real estate.

The Queen v. *Reed*, 5 Q. B. D. 583, and *Blackburn Building Society* v. *Cunliffe*, 22 Ch. D. 61, followed.

Bickford v. *Grand Junction R. W. Co.*, 1 S. C. R. 696, distinguished.

A statute passed in 1899 empowering the municipality of Rockwood to guarantee a loan to the society, "to be effected or procured for the purpose of erecting buildings and the improvement of the grounds of the said society," could not be construed as giving the society any power which it had not before, for a misapprehension of the law by the Legislature has not the effect of making that the law which the Legislature had erroneously assumed to be the law. *North-West Electric Co.* v. *Walsh*, 29 S. C. R. 33, followed. *In re Rockwood Agricultural Society*, 20 Occ. N. 25. 12 Man. L. R. 655.

See CONTRACT, I. 8.

IV. PROCEEDINGS AGAINST.

1. Information against — *Attorney-General—Status of informant — Pleading.*] —To an information in the name of the Attorney-General against a corporation the defendant cannot plead, by means of a pleading puis darrein continuance, that the informant has ceased to be a member of the defendant corporation and has lost all interest in the suit, and that all the actual members of the defendant corporation approve the attitude of the corporation. *Archambeault* v. *St. Lawrence Investment Society*, 3 Q. P. R. 71; Q. R. 17 S. C. 451.

2. Summary conviction — *Supplying electricity — Registration—Certificate—Penalty—Time for prosecution—Imprisonment —Distress.*]—The defendants, who were a body corporate, were summarily convicted under 57 & 58 V. c. 39, s. 35, before two justices of the peace, for supplying electricity to purchasers from the 1st August, 1897, to the 27th October, 1897, without having first obtained from the Department of Inland Revenue, or from an officer appointed for the purpose, a certificate of registration. The information was laid on the 27th October, 1897 The conviction awarded distress but not imprisonment. See ss. 34, 35 (2), 37 (*c*).

On the 1st August, 1895, the following regulation was established: "For every failure to procure a certificate of registration, as required by section 35, and the payment of the fee established therefor, within thirty days after the first day of July in each year, the contractor shall incur a penalty not exceeding $100 and not less than $50."

Held, that the regulation of the Governor in Council imposing a penalty for failing to take out a certificate was authorized by s. 37 (*c*) of the Act.

(2.) That the prosecution was commenced in time—there being no reasonable ground for saying that the offence was committed on the 1st July, 1897, and not afterwards. A new offence was committed each day that electricity was supplied without the certificate having been taken out.

(3.) That the conviction was bad for not awarding imprisonment for want of sufficient distress.

(4.) That a corporation cannot be convicted summarily. The word "person" in the Summary Convictions Act cannot be held to include a corporation or body corporate, notwithstanding the Interpretation Act, c. 1, s. 7, s.-s. 22. *Ex p. Woodstock Electric Light Co.*, 34 N. B. Reps. 460.

See CRIMINAL LAW, IV.

V. PROMOTERS.

Prospectus — *False statements — Liability of president.*] — In March, 1898, the prospectus of a trading and mining company was published. In it the defendant was named as president, and it contained false assertions, such as the statement that the company was formed by several important men of business in Montreal, that some of them, whose names were given, had consented to act as directors, and that a provisional board of directors had been formed. The defendant had consented to act as president of the company, at a salary of $1,000 a year, he had approved of the prospectus and of contracts made with workmen, and had deposited in a bank, as trustee, sums of money received from the latter as subscriptions to the capital of the company. Certain promoters had engaged the plaintiff and other workmen in the name of the company, had made them subscribe for a certain number of shares in the company and pay half the amount of their subscriptions, and had sent them to Edmonton upon a hiring for two years. The plaintiff, before signing his contract, had seen the defendant, and the latter had not warned him as to the false assertions of the prospectus. The workmen were abandoned at Edmonton.

Held, that, under these circumstances, the defendant was liable to the plaintiff for the amount which the latter had paid upon his subscription for shares and the damages which he had suffered by the breach of the contract made with him in the name of the proposed company. *Bonhomme* v. *Bickerdike*, Q. R. 17 S. C. 28.

VI. SHARES AND SHAREHOLDERS.

1. Issue at a discount—*Payment for services—Transfer — Certificate.*]—Where shares in a company incorporated under the Dominion Joint Stock Companies Act, R.S.C. c. 119, were issued as paid up shares, but part of the alleged payment consisted of an amount allowed by the company to the shareholders for services which by a contemporaneous agreement they agreed to render to the company, it was held, in a judgment creditor's action, that the shares, to the extent of the amount so allowed, must be treated as unpaid shares.

Where, without any transfer being executed, certificates of shares issued under the above circumstances were surrendered by the original holder to the company, and new certificates were, on the application of the transferor, issued by the company to the alleged transferee, it was held, having regard to s. 48 of the Act and the by-laws of the company, that the original holder had not divested himself of liability to a judgment creditor of the company suing under s. 55 of the Act. *Union Bank* v. *Code*, *Union Bank* v. *Morris*, 20 Occ. N. 300, 27 A. R. 396.

2. Judgment creditor — *Action by, against shareholder—Transfer of shares—Evidence.*]—Judgment creditors of an incorporated company, being unable to realize anything on their judgment, brought action against H. as a shareholder, in which they failed, from inability to prove that he was owner of any shares. They then brought action against G., in which evidence was given, not produced in the former case, that the shares once held by G. had been transferred to H., but were not registered in the company's books.

Held, affirming the judgment in 33 N. S. Reps. 77, that the shares were duly transferred to H., though not registered, as it appeared that H. had acted for some time as president of and executed documents for the company, and the only way he could have held shares entitling him to do so was by transfer from G.

Held, also, that, although there appeared to be a failure of justice from the result of the two actions, the inability of the plaintiffs to prove their case against H. in the first could not affect the rights of G. in the subsequent suit.

The company in which G. held stock was incorporated in 1886 and empowered to build a certain line of railway. In 1890 an Act was passed authorizing additional works to be constructed, increasing the capital stock, appointing an entirely different set of directors, and giving the company larger powers. One clause repealed all Acts and parts of Acts inconsistent therewith. G. had transferred his shares before the later Act came into force. The judgment against the company was recovered in 1895.

Held, that G. was never a shareholder of the company against which such judgment was obtained. *Hamilton* v. *Grant*, 20 Occ. N. 450.

See also *Hamilton* v. *Holmes*, 33 N. S. Reps. 100 *n*.

3. Transfer of shares—*Mandamus.*] —*Held*, affirming the judgment in Q R. 15 S. C. 396, that the writ of mandamus is the remedy open to one who wishes to have entered upon the books of a company a transfer of shares: but the writ should be directed against the company itself, and not against the directors of such company. *Upton* v. *Hutchison*, Q. R. 8 Q. B. 505.

See I. 1.

See also COURTS, VII. 5—CRIMINAL LAW, III. 3—PRINCIPAL AND AGENT, 3.

CONDITIONAL SALES.

See SALE OF GOODS, III.

CONFEDERATION.

See CROWN, IV. 2.

CONFLICT OF LAWS.

See COMPANY, II. 2—FRAUDULENT CONVEYANCE, 6.

CONSOLIDATION OF ACTIONS.

See COSTS, VII. 2—STAY OF PROCEEDINGS, 2.

CONSTITUTIONAL LAW.

1. Gambling — *Legislative powers of Territories.*]—R. O. (1888) c. 38, s. 5. enacts that "every description of gaming and all playing of faro, cards, dice, or other game of chance with betting or wagers for or stakes of money, or other things of value, and all betting and wagering on any such games of chance, is strictly forbidden in the Territories, and any person convicted before a justice of the peace, in a summary way, of playing at, or allowing to be played at, on his premises, or assisting, or being engaged in any way, in any description of gaming as aforesaid, shall be liable to a fine for every such offence, not exceeding one hundred dollars, with costs of prosecution, and, on non-payment of such fine and costs forthwith after conviction, to be imprisoned for any term not exceeding three months."

Held, that the evident purpose was to create an offence, subjecting the offender to criminal procedure, in the interest of public morals, and not for the protection of civil rights; and that the enactment therefore came within the decision in *Russell* v. *The Queen*, 7 App. Cas. 829, and consequently was *ultra vires*. *Regina* v. *Keefe*, 1 Terr. L. R. 280.

2. Insurance company—*License for British Columbia—Insurance Act of Canada.*]—H. was the authorized agent at Vancouver of an insurance company incorporated in Ontario but which was not registered or licensed under the provisions of any British Columbia statute or of the Insurance Act of Canada. H. was convicted by the police magistrate for Vancouver, under the provisions of the Insurance Act, for carrying on an insurance business without a license.

Held, that the Act is *intra vires* of the Parliament of Canada. *Regina* v. *Holland*, 20 Occ. N. 343, 7 Brit. Col. L. R. 281.

3. Municipal institutions—*Prohibition of "trading stamps"—Provincial statute—Interference with trade.*]—By s. 2 of c. 57 of 62 V. (N. S.), amending the charter of the city of Halifax, "no person * * * shall give, sell, or dispose of trading stamps, tickets, or cards to any person * * * doing business in the city of Halifax. Nor shall such person so doing business in the city of Halifax take or have in his possession any such trading stamp * * * Nor shall any vendor give, sell, or dispose of any such trading stamp * * * to any of his customers whereby such customer shall be entitled to receive for such trading stamp * * * any money, personal property, * * * The Trading Stamp Company, so called, is prohibited from doing business in the city * * * Any person violating this section shall be imprisoned in the city prison for nine months with hard labour."

Held, that the Act was *intra vires* the Provincial Legislature, coming within the head "Property and Civil Rights" or "Matters of a merely Local or Private Nature within the Province," and not a criminal law. *Montreal Trading Stamp Co.* v. *City of Halifax*, 20 Occ. N. 355.

4. Municipal institutions—*Provincial Legislatures—Powers of—By-law—Street Railways—Monopoly—Status of plaintiff.*]—*Held*, affirming the judgment in Q. R. 15 S. C. 580, that the Provincial Legislatures have sovereign powers within the range of subjects falling within the scope of provincial jurisdiction, including the governance of municipal institutions, and the Courts cannot set aside legislation relating to such matters on the ground that constitutional principles have been violated.

2. A by-law granting an exclusive privilege to a particular company to operate electric tramways for a term of years within a municipality comes within the scope of the authority of a town corporation which has been vested by the Legislature with the right to authorize the construction and operation of tramways upon such terms as it shall see fit. Such privilege is not a monopoly in the strict meaning of the word, and is not forbidden by law.

3. The contract in question in this case having been confirmed by 57 V. (Q.) c. 73, the appellants were without interest to contest the validity of the by-law on which it was based. *Bell* v. *Town of Westmount*, Q. R. 9 Q. B. 34.

5. Railways — *Consolidated Railway Act, 1879, s. 19, s.-s. 16 (D.)—Prohibited contract—Directors.*]—The appellant was a director and the president of the Temiscouata Railway Company at the time he entered into certain agreements with the contractors for the construction of the road, which agreements gave him an interest in their contracts.

Held, that the provisions of the Consolidated Railway Act, 1879, s. 18, s.-s. 16, are constitutional. The Dominion Parliament having the right to legislate on matters concerning railways, it has also the power to legislate on all incidents which may be required to carry out the object it had in view, provided such incidents are essentially and strictly connected with the principal object, and are primarily intended to assist in carrying out such principal object; and the capacity or incapacity of directors is a matter essentially connected with the internal economy of a railway company.

2. Where a contract is prohibited by statute, such contract is void, although the statute itself does not state that it is so, and only imposes a penalty on the offender.

3. Consequently, where the president of a railway company entered into a secret partnership with the contractors for the construction of the road, no action can be maintained by him against his partners to enforce such contract. *Macdonald* v. *Riordan*, Q. R. S. Q. B. 555.

6. Railways — *Municipal corporations —Construction of highway across railway —Railway Committee of Privy Council.*]—Upon the application of the defendants under s. 14 of the Railway Act of Canada for an order authorizing the extension of a street in their city across the tracks of the plaintiffs, the Railway Committee of the Privy Council for Canada ordered and directed that the defendants "may have a temporary crossing, at rail level, for foot passengers only, over the said tracks," upon certain conditions.

Held, that the Provincial Legislature alone had power to confer upon the defendants legal capacity to acquire and make the street in question.

2. It has conferred such capacity.

3. In virtue of its power over property and civil rights in the Province, the Provincial Legislature has power to authorize a municipality to acquire and make such a street, and to provide how and upon what terms it may be acquired and made.

4. But that power is subject to the supervention of federal legislation respecting works and undertakings such as the railway in question.

5. The manner and terms of acquiring and making such street, and also the prevention of the making or acquiring of such a street, are proper subjects of such supervening legislation.

6. Such legislation may rightly confer upon any person or body the power to determine in what circumstances, and how and upon what terms, such a street may be acquired and made, or to prevent the acquiring and making of it altogether, and therefore s. 14 of the Railway Act is not *ultra vires*.

7. Such legislation, in virtue of its power over such railway corporations as well as such works and undertakings, may confer power to impose such terms as have in this case been imposed upon the plaintiffs, and to deprive such corporations of any right to compensation for lands so taken or injuriously affected; and has conferred such power on the Railway Committee, under s. 14, in such a case as this; which power has here been exercised to some extent.

8. Such legislation has not conferred upon the Committee power to give the temporary foot-way in question.

9. Nor any authority to delegate its powers.

10. The work it directs must be constructed under the supervision of an official appointed for that purpose by the Committee.

11. The railway company may, if they choose, construct the works directed, under such supervision, instead of permitting the municipality to do so. *Grand Trunk R. W. Co.* v. *City of Toronto*, 20 Occ. N. 384, 32 O. R. 135.

(See Therrien v. Grand Trunk R. W. Co., 20 Occ. N. 431.)

7. Tolls—*Yukon Territory—Franchise—Dominion lands.*]—The Executive Government of the Yukon Territory may lawfully authorize the construction of a toll tramway or waggon road over Dominion lands in the territory, and private persons using such road cannot refuse to pay the tolls exacted under such authority. *O'Brien* v. *Allen*, 20 Occ. N. 295, 30 S. C. R. 340.

8. Treaties with Indians—*Contingent annuities—B. N. A. Act, s. 112—Res judicata.*]—The award complained of by the Province of Quebec determined that certain payments made by the Dominion of Canada in virtue of the Huron and Superior Treaties with the Ojibeway Indians for arrears of augmented annuities and interest from 1867 to 1873, and for increased annuities in excess of the fixed annuities with interest paid subsequently, should be taken into account and included in the debt of the late Province of Canada mentioned in s. 112 of the B. N. A. Act.

Held, that the question of these contingent annuities had been considered

and decided in *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1897] A. C. 199, and that the payments so made by the Dominion were recoverable from the Provinces of Ontario and Quebec conjointly in the same manner as the original annuities. *Province of Quebec* v. *Dominion of Canada*, 30 S. C. R. 151.

9. Treaties with Indians—*Lands—Surrender — Precious metals—Crown—Acquiescence.*] — A treaty of surrender of Indian territory to the Dominion in 1873 provided that certain lesser reserves in the lands surrendered were to be defined and set apart, and thereafter to be administered and dealt with for the benefit of the Indians. Part of one of these lesser reserves, in Ontario, was in 1886 surrendered to the Queen under the Indian Act of 1880 in trust to sell upon such terms as the Dominion Government might deem most conducive to the welfare of the Indians; and of this, certain lands were granted by the Dominion Government to the plaintiffs, with the precious metals therein. The defendants asserted title in fee to the same lands under an Ontario patent of 1899. It appeared that in negotiating the treaty of 1873 the Dominion commissioners represented to the Indians that they would be entitled to the benefit of any minerals that might be discovered on any of the lesser reserves.

Held, that, after the surrender in 1886, title to the land and to the precious metals therein could be obtained only from the Crown as represented by the Province of Ontario. With the royal mines and minerals the Indians had no concern; nor could the Dominion make any valid stipulation with them which could affect the rights of Ontario.

Semble, that a Province is not to be held bound by alleged acts of acquiescence of departmental officers which are not brought home to or authorized by the proper executive or administrative organs of the Provincial Government, and are not manifested by any order in council or other authentic testimony. *Ontario Mining Co.* v. *Seybold*, 20 Occ. N. 10, 31 O. R. 386.

See *Yule* v. *The Queen*, 19 Occ. N. 371, 30 S. C. R. 24 (*post* **CROWN**); *Ren.* v. *Toronto R. W. Co.*, 19 Occ. N. 386, 26 A. R. 491 (*ante* **APPEAL**).

See APPEAL, V. 1, IX. 5, XIV. 8—ARREST, III. 10—COMPANY, III. 2—CRIMINAL LAW, VII. 10—CROWN, III. 1—MUNICIPAL ELECTIONS, I. 3—REGISTRY LAWS, III. 3.

CONSUL.

See USE AND OCCUPATION.

CONTEMPT OF COURT.

See EXECUTION, I. 2, IV.—JUDGMENT DEBTOR.

CONTRACT.

I. BREACH.
II. CONDITIONS.
III. CONSTRUCTION.
IV. MAKING THE CONTRACT.
V. REFORMATION.

See ACCOUNT, 2—CROWN, IV. 1—HUSBAND AND WIFE, VI., VII.—INSURANCE, LIMITATION OF ACTIONS, 2, 5—LIQUOR LICENSE ACT, II. 1—MASTER AND SERVANT, III. 3 — MUNICIPAL CORPORATIONS, VI.—PARTIES, III. 3—PARTNERSHIP — PATENT FOR INVENTION, 2 — PLEADING, IX. 1 — SALE OF GOODS — SHIP, 4—STREET RAILWAYS, 1—VENDOR AND PURCHASER.

I. BREACH.

1. Condition precedent — *Divisible contract.*]—The defendants agreed to buy a machine, the agreement being in the form of an order signed by the defendants and adopted and accepted by the plaintiffs, who shipped the machine ordered, and now sued for the price.

It had been a term or condition of the agreement that M., the inventor of the machine, and the plaintiffs' agents for sales of it, should personally inspect the placing of the machine in operation. This M. failed to do, but the plaintiffs sent a competent person to set the machine up, whom, however, the defendants would not allow to do so, inasmuch as M. was not present.

Held, that the plaintiffs, nevertheless, were entitled to judgment for the price of the machine, on the principle that unless the non-performance alleged in breach of a contract goes to the whole root and consideration of it, the part broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages. *Cowan* v. *Fisher*, 20 Occ. N. 34, 31 O. R. 426.

2. Condition precedent—*Inability to perform—Municipal corporations—Resignation of councillor — Disqualification.*]—The defendant, who was a municipal councillor, entered into a sub-contract with the plaintiff to do the brick and mason work under the plaintiff's contract with the municipality to build a town hall, that contract providing that the contractor should not sub-let the work or any

part thereof without the consent in writing of the architect and municipality, and this consent the plaintiff was to obtain. The municipality refused to consent to the sub-contract, on the ground that the defendant's services would be of value in the oversight of the contract.

Held, that there could not be imported into the defendant's sub-contract an agreement to resign his seat, as such an agreement to resign a public trust for private gain would be contrary to public policy and illegal, and that the defendant was not liable in damages because of the breach of an implied obligation to resign, though his resignation might, as the plaintiff contended, have enabled the plaintiff to fulfil the condition precedent on his part of obtaining the municipality's consent.—*Semble*, if the sub-contract had taken effect, the defendant would have been, under s. 80 (1) of the Municipal Act, R. S. O. c. 223, disqualified.

Judgment in 30 O. R. 411, 19 Occ. N. 165, reversed. *Ryan* v. *Willoughby*, 20 Occ. N. 198, 27 A. R. 135.

3. Manufacture and sale of chattels—*Damages.*]—Five days after making a contract with the plaintiffs for the manufacture by them of a large number of shells for electric light lamps, to be delivered monthly for a period of twenty months, the defendants notified the plaintiffs that they would not carry out the contract. The plaintiffs had done nothing towards performing the contract, and had incurred no expense.

Held, that though they were entitled to bring an action at once to recover damages, they should not be allowed as damages the full amount of their expected profit, but that allowance should be made for the many contingencies which might have happened before the time for fulfilment.

The Court, stating the general principles and pointing out some of the contingencies, reduced the amount of damages allowed. *Ontario Lantern Co.* v. *Hamilton Brass Manufacturing Co.*, 20 Occ. N. 298, 27 A. R. 346.

4. Partnership—*Abandonment — Damages — Loss of profits.*]—The plaintiff brought an action claiming damages for breach of contract. The evidence shewed that, if anything was due by the defendant, it was not due to the plaintiff individually, but to a partnership of which he was a member, and the profits of which were to be shared equally between the two partners.

Held, that the action, under the circumstances, could not be maintained, even for half of the amount which might be found to be due as damages, the Court not being in a position in such action to determine the respective shares of the partners in a debt due to the partnership.

2. Where contractors, after part performance of their contract, voluntarily abandon it, without notice to the supplier of material, and when there is no obstacle to the completion thereof, they are not entitled to claim from the latter damages for loss of profits on the part of the contract they failed to carry out. *Masolais* v. *Willett*, Q. R. 17 S. C. 262.

5. Practising medicine—*Damages—Injunction.*]—By an agreement under seal the defendant sold to the plaintiff a house and the good-will of his medical practice for $2,100, and the defendant "bound himself in the sum of $400 to be paid to the (plaintiff), in case the (defendant) shall set up or locate himself in the practice of medicine or surgery within the space of five years from the date hereof within a radius of five miles from the said village."

Held, that there was an implied agreement by the vendor not to resume practice; that the sum of $400 was payable as liquidated damages on the breach of the agreement; and that the purchaser was entitled to that sum or to an injunction, but not to both.

Judgment in 31 O. R. 91, 19 Occ. N. 317, varied. *Snider* v. *McKelvey*, 20 Occ. N. 298, 27 A. R. 339.

6. Practising medicine—*Residence—Non-registration—Consideration — Waiver—Repair.*]—The plaintiff, a physician in large practice at S., being about to leave the Province temporarily, leased to the defendant, who was also a physician, a part of his house for two years from July then next, at an annual rental. By a covenant in the lease the defendant agreed at the expiration of the lease either to purchase the whole property for a price named, or to forthwith leave S. and not reside there, or practise thereat, or within ten miles thereof, for at least three years. The plaintiff covenanted to repair the roof of the house on or before the said first of July, and not to practise in S. during said two years. Nothing was done towards the repairs up to the 1st July, as had been agreed: in fact the roof was not put in a satisfactory condition until the autumn of 1895, when an entirely new roof was put on. This breach was not wilful on the part of the plaintiff, and the defendant made no complaints as to the non-repair during the two years he occupied the premises. At the time of the making of the agreement, 3rd May, 1894, the plaintiff was not registered under the New Brunswick Medical Act, 44 V. c. 19, but he had been registered the previous year and was entitled to be again registered at any time upon the

payment of a small fee. It was admitted that except as to the repairs the plaintiff had performed all the covenants entered into by him. At the end of the two years the defendant refused either to purchase or to leave S. and refrain from practising there.

Held, affirming the judgment of the Court below, 1 N. B. Eq. Reps. 487, that the restraint sought to be enforced was not unreasonable either as to practice or residence.

2. That the non-registration of the plaintiff did not make the agreement bad for want of consideration.

3. That whatever rights had accrued to the defendant by the breach of the covenant to repair had been waived by his entering into possession of the premises and remaining there during the term without complaint.

4. That the covenant to repair was an independent covenant, and its performance was not a condition precedent to the maintenance of this suit. *Ryan* v. *McNichol*, 34 N. B. Reps. 391.

7. Renewal — *Damages — Interest.*]— 1. Where it was agreed by the defendants as follows:—"If we are satisfied with you (plaintiff) as a customer, we would favourably consider an application from you at the expiration of the term for a renewal of the same, for another period;" and there was evidence that the defendants were satisfied with the plaintiff as a customer, he was entitled to damages from defendants for refusal to renew, and the damages should be based on the profit which would have accrued to the plaintiff during the term of renewal which appeared to be contemplated by the parties at the date of the negotiations.

2. Where damages are awarded for breach of contract, and no interest is included in the several amounts allowed to the plaintiff, although interest was asked for by the conclusions of the declaration, and it appears from the evidence that these amounts were really the minimum estimate of the damages suffered, as they existed at the date of the institution of the action, he is entitled to interest from date of service of action on the total amount awarded to him by the judgment; and where such interest is not awarded by the Court below, the omission will be rectified on appeal. *Montreal Gas Co.* v. *Vasey*, Q. R. 8 Q. B. 412.

8. Road company—*Implied covenant —Corporate seal.*]—An agreement signed by the plaintiff and by the superintendent of the defendants' road, but not under seal, and not purporting to be made by the defendants, who were an incorporated road company, was in part as follows:—"I"—the plaintiff—"have this day agreed with" the defendants "to furnish good gravel and deliver the same on the centre of the road bed * * * and the company agree to pay me at the rate of * * *. And it is further agreed that my tolls * * * shall be free during the full term * * * And * * * that in consideration of this agreement and for the sum of $1 * * * I do * * * discharge all claims I hold against the company. * * * And * * * that this agreement for gravel to hold good as long as the company keep the road and as long as my gravel holds good * * *."

Held, that an agreement on the part of the defendants to take from the plaintiff all the gravel they should require for the portion of their road referred to in the writing, as long as he was able and willing to supply it, was not to be implied from the terms of the writing; and the taking of gravel from another person was not a breach of the agreement.

Held, also, per Ferguson, J., that to bind the corporation by an executory contract to purchase from the plaintiff all the gravel required for a portion of their road for an indefinite and protracted period, would require an agreement under their corporate seal. *Hill* v. *Ingersoll and Port Burwell Gravel Road Co.*, 20 Occ. N. 403, 32 O. R. 194.

9. Sale of business and good-will— —*Undertaking not to carry on similar business—Meaning of "good-will"—Injunction—Damages — Costs.*]—The defendant prior to the 16th November, 1898, was the owner and driver of a stage-coach running daily between two towns. The business consisted, besides the carrying of passengers, in the soliciting, calling for, carrying, and delivering of parcels for reward. The stock comprised horses and vehicle, robes, etc., used in connection with the business.

On the 16th November, 1898, the defendant sold all the stock and the goodwill of the business to the plaintiff for $300, and agreed not to go into the same business, or a similar business, between the same places, for three years from the 1st December, 1898.

Notwithstanding this agreement and the receipt of the $300, the defendant entered the employment of P. & Son, who, on the 1st August, 1899, started an opposition stage-coach on the same route and for the same business and purpose; and the defendant became the caller, canvasser for business, and driver of such coach.

Held, that the conduct of the defendant was a violation of the terms of his agreement.

Discussion as to the meaning of "goodwill," and the effect of a sale of the good-will of a business. *Greer* v. *Thody*, 20 Occ. N. 43.

10. Trade agreement — *Breach of covenant—Parties—Directors of association—Restraint of trade—Public policy—Damages.*]—The defendant, with others, by a writing, covenanted separately with the plaintiffs, the board of directors of the Cheese and Butter Makers' Association of Western Ontario, that if he should at any time thereafter, within the Province of Ontario, for the space of three years, violate the stipulations mentioned in the agreement, by directly or indirectly becoming bound as a cheese or butter maker to make good to his employer any sum of money lost to him by reason of the inferior quality of the cheese made by him, except so far as such inferior quality may have been caused by his gross negligence, he should pay to the treasurer of the board $200 as liquidated damages, which should become part of the funds of the association.

This covenant was entered into for the purpose of preventing cheese makers from making agreements with the owners of cheese factories to become liable for the quality of the product even in the case of its inferiority being due to the character of the milk supplied.

The defendant entered into an agreement in violation of his covenant.

Held, that the covenant having been entered into with the plaintiffs, they had a status to sue for the breach, without joining the other covenantors, although the agreement was mutually advantageous.

2. That the evidence did not support the defendant's contention that his signature was obtained by misrepresenting or misreading the document to him, so that he did not understand what he was signing.

3. That there was a good consideration for the covenant, in the benefit to the defendant, although no consideration was mentioned in the document.

4. That the agreement was not in restraint of trade.

5. That the $200 mentioned in the agreement was to be regarded not as a penalty but as liquidated damages. *Miller* v. *Thompson*, 20 Occ. N. 77.

11. Work and labour — *Implied stipulation.*]—Where the respondent contracted with the Government to execute for a term of years the printing and binding of certain public documents at stipulated prices, but the Government did not expressly contract to give to the respondent all or any of the said work:—*Held*, that a stipulation to that effect could not be implied, and that there was no breach of contract by reason of orders for work being withheld. *Regina* v. *Demers*, [1900] A. C. 103.

II. CONDITIONS.

1. Consent of third party—*Time—Misdirection.*]—Where an agreement is made subject to the consent of a third party, it must be looked upon as a conditional agreement, dependent upon such consent being given within a reasonable time; in default of which the agreement must be taken not to have become effective.

Held, on the evidence, that, assuming there was evidence of such a conditional agreement, the date at which it was alleged the consent of the third party was obtained could not, under the circumstances, be reasonably found by the jury to be within a reasonable time after the making of the agreement; and that therefore the Judge's charge to the effect that there was no evidence of an agreement was not objectionable—at all events, as no substantial wrong or miscarriage of justice was occasioned thereby. *Martin* v. *Reilly*, 1 Terr. L. R. 217.

2. Forum—*Acceptance of jurisdiction—Pleading to merits.*]—The defendant, by pleading to the merits of the action, accepts the jurisdiction and is not entitled thereafter, by declinatory exception, to invoke, as ousting the jurisdiction of the Court, the condition of the bill of lading sued on, to the effect that all disputes arising from the bill of lading were to be settled before the Hamburg law Courts. *Ramsay* v. *Hamburg-American Packet Co.*, Q. R. 17 S. C. 232.

3. Railway construction—*Certificate of engineer.*]—Where the contract for construction of a railway provided that the work was to be done to the satisfaction of the chief engineer of a railway company, not a party to such contract, who was to be the sole and final arbiter of all disputes between the parties, the contractors were not bound by such condition, when the person named as arbiter proved to be, in fact, the engineer of the other party to the contract, while supposed by the contractors to be the engineer of the railway company as described.

Judgment in 26 A. R. 133, 19 Occ. N. 131, affirmed. *Good* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 20 Occ. N. 49, 30 S. C. R. 114.

4. Written promise — *Legal obligation.*]—Held, that a written promise by the appellants that, if satisfied with the respondent as a customer, they would favourably consider any application by him to renew a subsisting contract between them on its expiration, does not impose a legal obligation to grant it. *Montreal Gas Co.* v. *Vasey*, [1900] A. C. 595.

See also Cases under I.

III. CONSTRUCTION.

1. Delivery of goods—*Place*—"*At*," *meaning of.*]—The plaintiff, tendering for a supply of coal for the defendants' waterworks, wrote, "I will deliver in bond into the coal shed at pumping station or grounds adjacent thereto where directed by you, one thousand tons," etc. The plaintiff's tender being accepted, a contract was drawn up by which he agreed to deliver *at* the coal shed," etc.

The defendants refused to accept or pay for the greater part of the coal furnished by the plaintiff, because it was not delivered to them at the place mentioned in the contract, *i.e.*, it was not put into the shed by the plaintiff, but left at the dock near the pumping station.

Held, that the portion of the coal in question was not delivered at the place designated by the contract.

Per Boyd, C.—"At" means rather within a place than without; "at" the coal shed means "in" or "in close proximity to" the shed. The cases referred to as to the meaning of the word "at" merely shew its meaning under the circumstances of each case. Such words take their colouring from their circumstances and situation. *Holmes* v. *Town of Goderich*, 20 Occ. N. 303.

2. Furnishing heating apparatus—*Guaranty as to degree of heat.*]—The plaintiff entered into a contract with the defendant to construct and complete a hot-water heating apparatus in a house being erected for the defendant, and agreed that the apparatus would give seventy degrees of heat when the weather was ten degrees below zero.

The apparatus was put in, but it failed to give the promised heat, and another contract was entered into by which the plaintiff undertook to make some changes, and guaranteed that the apparatus would heat the rooms in which the radiators were changed to a temperature of seventy degrees when the thermometer registered ten degrees below zero outside.

Held, that guaranties such as these are to be construed reasonably, according to the intent of the parties, and the more strongly against those giving them.

The proper construction was that the heating apparatus, if fed and managed in the ordinary way, would give seventy degrees of heat when the weather was ten degrees below zero, and would heat the rooms in which the radiators were changed to a temperature of seventy degrees when the thermometer registered ten degrees below zero outside.

The evidence shewed beyond reasonable doubt that the apparatus did not answer and was incapable of being made to answer these guaranties. *Greenway* v. *Gardiner*, 20 Occ. N. 68.

3. Lease of hall—*Insurance.*]—In the interpretation of a contract, doubts must be solved in favour of the debtor and against the creditor, and more particularly so when the contract has been prepared by the creditor. Such doubts, however, must be reasonable, and such as to embarrass a person of intelligence as to the real intention of the parties. Applying this principle to the present case, in which the defendant, lessee of a hall to be used as a theatre, was bound to pay "all extra premium of assurance that the company with which the premises now leased may be assured shall exact over and above the present rates paid by the lessors or any of their tenants *under said hall* in consequence of the nature of any performance or entertainment carried on in said premises," the words "*under said hall*" could not be extended to include stores on the lower floor which were not under *the hall*, though extra insurance was paid thereon by the lessor in consequence of the use of the hall as a theatre. *Watson* v. *Sparrow*, Q. R. 16 S. C. 459.

4. Mineral rights—*Right to possession.*]—By an agreement made on the 13th January, 1897, in consideration of $1, the owner of certain lands agreed "to lease and hereby does lease to (the plaintiff) the following described premises," mentioning them, and "hereby leases and agrees to give and convey hereby to said (plaintiff) all mineral rights on said premises, the right to quarry stone, and the right to bore for gas, with privilege to erect and bring to said premises all necessary tools, machinery, and conveniences for mining, quarrying, and boring on said premises, and to erect buildings thereon for said tools and machinery and for housing employees, and also to drain said premises and to build necessary railroad thereon."

"Said (plaintiff) also agrees if he uses said property under this agreement to take therefrom the amount of 50,000 cords of stone, and to pay therefor the sum of 25 cents per cord per United States specifications. Said (owner) hereby agrees that he will give no other party or corporation any rights on said premises for the above described purposes on or before August 1st, 1897."

"Unless said (plaintiff) utilizes said premises for said purposes on or before August 1st, 1897, this lease shall be null and void."

Held, that under this agreement the plaintiff was not entitled to exclusive possession of the land, or to quarry all the stone thereon, but only to quarry 50,000 cords. *Haven* v. *Hughes*, 20 Occ. N. 55, 27 A. R. 1.

5. Use of race track — *Lease or license—Forfeiture.*]—An agreement under seal between the plaintiff and defendants providing for the use of the defendants' race track by the plaintiff under certain conditions and in consideration of certain payments:—*Held*, upon its true construction, not to be a lease, but a mere license; that the relationship of landlord and tenant did not exist between the parties; and, upon the evidence, that there was a breach of the contract, for which the defendants might properly forfeit, and that the contract was in law properly forfeited and declared void by the defendants. *Lyles* v. *Windsor Fair Grounds and Driving Park Association*, 20 Occ. N. 363.

See DEED.

IV. MAKING THE CONTRACT.

1. Offer and acceptance—*Telegrams—Completion.*] — In an action for damages for non-delivery of oats pursuant to an alleged contract by telegrams:—*Held*, that there was no completed contract between the parties, as they did not come to an understanding in respect to some of the material terms, and the buyer could not recover. *Cole* v. *Sumner*, 20 Occ. N. 324, 30 S. C. R. 379.

2. Parol evidence—*Collateral verbal contract.*]—D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned, and agreeing to pay a commission of five per cent. on the selling price, such commission to include all expenses. H. failed to effect a sale.

Held, affirming the judgment in 6 Brit. Col. L. R. 505, that in an action by H. to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration, parol evidence was admissible to shew that the written instructions did not constitute the whole of the terms of the contract, but there had been a collateral oral agreement in respect to the expenses; and that the question as to whether or not there was an oral contract in addition to what appeared in the written instructions was a question that ought properly to have been submitted to the jury. *Dunsmuir* v. *Lowenberg, Harris, and Co.*, 20 Occ. N. 273, 30 S. C. R. 334.

3. Sub-contractor — *Rights against principal—Promise — Burden of proof—Acceptance of order—Ratification — Bills of Exchange Act—Money had and received.*]—Plaintiff contracted with F., for the sum of $200, to do the plumbing of a house which F. had contracted to build for the defendant W. E. M. according to specifications which included plumbing. F. having failed to complete his contract, plaintiff sought to recover the amount due him from W. E. M., whose wife, M. M., was joined as a co-defendant, alleging that, before he undertook the work, he saw M. M., who was acting for W. E. M., in his absence, and that she agreed to pay him the $200 and keep it out of the contract.

Held, that the promise alleged, if made, was gratuitous, and not legally binding: that it would take strong evidence as to consideration and as to the intent of the parties, to give the promise an effect which would make the party promising liable to pay plaintiff; that the burden of proof was on plaintiff, and, the evidence on the point being contradictory and unsatisfactory, the finding of the trial Judge that plaintiff looked to defendants as his paymasters, and did the work for them and not for F., must be set aside.

After the work which plaintiff contracted to do had been completed, F. drew an order on M. M. for the amount to which plaintiff was entitled, which M. M. accepted in these terms: "Accepted by Mrs. Matheson."

The trial Judge found that M. M. had no authority to accept so as to bind her husband, but that the latter had ratified his wife's act and was liable on the order.

Held, reversing this finding, that the acceptance, being one which purported to be binding only upon M. M., was incapable of ratification by the defendant W. E. M., and that the doctrine of ratification was inapplicable.

Held, further, that the document was governed by s. 23 of the Bills of Exchange Act, and that no one could be made liable on it as acceptor who had not signed it as such.

Held, further, that the action for money had and received was inapplicable to the case under consideration, such action lying only where a person has received money under circumstances rendering the receipt of it a receipt by such person to the use of the plaintiff. *Craig* v. *Matheson*, 32 N. S. Reps. 452.

V. REFORMATION.

Obvious error.]—Where the word "company" was used in a sub-contract for the construction of fencing for a

railway in error for "Charlebois," the principal contractor, as clearly appeared, reformation of the contract was decreed. *Sinclair* v. *Preston*, 20 Occ. N. 359.

CONTRIBUTION.

See FENCES—PARTNERSHIP, I. 2—WAY, III. 1.

CONVERSION.

Tenants in common — *Removal of chattel to foreign country.*]—An action for conversion of his interest in a chattel lies by one tenant in common against his co-tenants in common if the chattel owned in common is destroyed by them, or so dealt with by them as, in effect, to put an end to his rights.

In this case the removal of a brick making machine to a foreign country was held sufficient to support the right of action, the plaintiff's power of enforcing his rights in the Courts of this Province being thus interfered with. *McIntosh* v. *Port Huron Petrified Brick Co.*, 20 Occ. N. 200. 27 A. R. 262.

See MECHANICS' LIENS, II. 3—SALE OF GOODS, VII. 2.

CONVICTION.

See APPEAL, IX. 1, 2, 3 — CANADA TEMPERANCE ACT — CERTIORARI — COMPANY, IV. 2 — COURTS, III. — CRIMINAL LAW — FIRE, 1—JUSTICE OF THE PEACE, 1, 2, 3 — LIQUOR LICENSE ACT—MUNICIPAL CORPORATIONS, IV. 3, XV. 1, 2, 4—STATUTES, IV.

COPYRIGHT.

Works of fine art—*Imperial Act—Extension to Colonies.*]—The Imperial Act 25 & 26 V. c. 68, being an Act for amending the law relating to copyright in works of fine art and for repressing the commission of fraud in the production and sale of such works, does not extend to the Colonies, but the copyright therein and thereby conferred is confined to the United Kingdom. *Graves* v. *Gorrie*, 20 Occ. N. 456.

See COSTS, IX. 4.

CORONER.

See CRIMINAL LAW, VIII. 4.

CORROBORATION.

See EVIDENCE, III.

CORRUPT PRACTICES.

See MUNICIPAL ELECTIONS, I. 11—PARLIAMENTARY ELECTIONS, I.

COSTS.

I. DISCRETION AS TO.
II. OUT OF ESTATE.
III. SCALE OF.
IV. SECURITY FOR.
V. SET-OFF.
VI. SUCCESSFUL PARTY ENTITLED TO.
VII. TAXATION OF—ITEMS.
VIII. TAXATION OF—RIGHT OF APPEAL FROM.
IX. OTHER CASES.

See ABSCONDING DEBTOR, 2 — ACCOUNT, 1—ACTION, 1 — AMENDMENT — APPEAL, VI. 2, VIII., XVI. 1—ARREST, III. 7—ATTACHMENT OF DEBTS, II. 1, 7 — ATTACHMENT OF GOODS, 2 — BANKRUPTCY AND INSOLVENCY, I. 1, 5—CHOSE IN ACTION, 3—CONTRACT, I. 9—COURTS, VI. 5—CRIMINAL LAW, VII. 1, 8, IX. 4, 5, 7—CROWN, IV. 4—DAMAGES, 1—DISAVOWAL—DOWER, 2 — EXECUTION, III. 7, 18 — FRAUDULENT CONVEYANCE, 2—HUSBAND AND WIFE. I. 7, III. 2, V. 4, VIII. 2—INFANT, II. 3—INJUNCTION, I. 1—JUSTICE OF THE PEACE, 1—LIMITATION OF ACTIONS, 7—LUNATIC, 1, 4—MALICIOUS PROCEDURE, 1—MASTER AND SERVANT, VIII. — MORTGAGE, II. 6—MUNICIPAL CORPORATIONS, II. 2, IV. 3, IX. 2, XIII. 1, XV. 1, 2—PARTICULARS, I. 6, II. 2, II. 9—PLEADING, IV.—REVIVOR, 1 — SCHOOLS, 4 — SESSIONS — SHERIFF, 1—STAY OF PROCEEDINGS, 1, 3—TRIAL, II. 1, 2, VI. 2, VII.—TRUSTS AND TRUSTEES, 3—WAY, IV. 4.

I. DISCRETION AS TO.

1. County Court—*Appeal.*]— Action brought in a County Court to recover $155.98 due upon a promissory note. Defence, as to $122, payment and set-off; but no defence was set up to the residue of the demand. The Judge found in the defendant's favour on the question of payment and set-off, but refused the defendant the costs of suit, because the balance of $33.98, which the defendant did not deny was due to the plaintiff, had not been paid into Court or to the plaintiff.

On appeal, the defendant was allowed his costs of suit in the County Court. *Kendall* v. *Benson*, 20 Occ. N. 408.

2. Interlocutory order — *"Costs in the cause"—Trial Judge.*]—Where an interlocutory order in an action directs that the costs of certain proceedings shall be "costs in the cause," that is not a final disposition of such costs in favour of the party who shall succeed in the action, but merely puts those costs in the same position as any other of the ordinary costs of the action, that is, leaves them to be dealt with in the discretion of the trial Judge under Rule 1130 and s. 119 of the Judicature Act, R. S. O. c. 51.

Koosen v. *Rose*, [1897] 1 W. N. 25, 76 L. T. 145, 45 W. R. 137, 13 Times L. R. 257, distinguished. *Dickerson* v. *Radcliffe*, 20 Occ. N. 390, 19 P. R. 223.

3. Interlocutory order — *"Costs in the cause"—Trial Judge.*]—The judgment of the trial Judge was in favour of the plaintiff, and was not appealed against. As to costs, it adjudged that the defendants should pay to the plaintiff the costs of certain witnesses, and continued: "This Court doth not see fit to interfere with the interlocutory orders disposing of certain costs throughout the action, nor make any further or other order as to costs."

Two interlocutory orders made the costs of applications "costs in the cause;" two made them "costs in the cause to the successful party:" one order provided that "the defendant do pay to the plaintiff the costs of this motion to be taxed in any event of the cause but on the final taxation of the costs therein."

It was conceded that the plaintiff was entitled to the costs made payable in any event.

Held, following *Dickerson* v. *Radcliffe*, *supra*, that the costs made costs in the cause were subject to the disposition of the trial Judge, and under the judgment were not to be taxed to the plaintiff.

Held, also, that "costs in the cause to the successful party" did not mean more than costs in the cause; and, even if it did, the plaintiff was not a successful party.

Brotherton v. *Metropolitan District Railway Joint Committee*, [1894] 1 Q. B. 666, followed. *Murr* v. *Squire*, 20 Occ. N. 388, 19 P. R. 237.

II. Out of Estate.

Will—*Action to set aside — Dismissal without costs—Parties—Administration.*]—In an action to set aside a will for undue influence by two of the defendants, one of whom was the executor, the attack failed, and the action was dismissed, but without costs as to these two defendants, there being circumstances which might, unexplained, appear to be suspicious.

The other defendants, two pecuniary legatees under the attacked will, and a religious society to whom land was devised by it, submitted their rights to the Court, but appeared by counsel at the trial, and joined in resisting the plaintiffs' claim.

Held, that these defendants were in the position of "interveners" under the English procedure, and were not entitled to costs out of the estate.

Held, also, that they were not entitled to costs against the plaintiffs.

Semble, that they would be entitled to compensation in the administration of the estate. *Logan* v. *Herring*, 20 Occ. N. 258, 19 P. R. 168.

III. Scale of.

1. Cancellation of lease—*Class of action.*]—The plaintiff had rented land from the defendant, at an annual rent of $108, payable $9 a month, the lease being for five years, with power to the tenant to terminate it in any year by giving three months' notice. The plaintiff, in the month of August of one of the first years, sued for the cancellation of the lease, and succeeded in obtaining such cancellation with $24 damages, and costs.—*Held*, that, under these circumstances, the lease being a yearly one as regarded the plaintiff, the class of action, as regarded the costs awarded against the defendant, was that of an action for $81, being the balance of rent for the year which, at the time the action began, still had to run. *Chartrand* v. *Ouimet*, Q. R. 17 S. C. 164, 2 Q. P. R. 418.

2. County Court — *Ascertainment of amount—Goods sold.*]—In an action for the price of goods sold, in which the plaintiff recovered $290, it was contended that that amount was ascertained by the act of the parties, and therefore within the jurisdiction of the County Courts, because the goods were sold according to a price list agreed to, and therefore the amount was ascertainable by a simple computation.

Held, not so.

Thompson v. *Pearson*, 18 P. R. 420, distinguished. *Evans* v. *Chandler*, 20 Occ. N. 260, 19 P. R. 160.

3. County Court — *Defence arising after action — Division Court garnishment —Payment into Court.*]—On the 5th August, 1899, a creditor of the plaintiff

issued a summons out of a Division Court claiming $64 from the plaintiff, and claiming to attach moneys in the hands of the defendant, as garnishee, to answer the plaintiff's debt, and served it on both primary debtor and garnishee on the day of its issue. On the 17th August this action was brought in a County Court to recover $133.40. On the 28th August the garnishee (the defendant in this action) paid $57.50 into the Division Court. On the 6th September judgment was given in the Division Court for the primary creditor against the primary debtor (the plaintiff in this action) for $64 and against the garnishee for $57.50. On the 5th October the plaintiff delivered his statement of claim for the whole $133.40.

Held, that the service of the summons was no bar to this action; that the defence that the defendant was discharged as to $57.50 by his payment into the Division Court was a defence which did not arise until the payment was made and judgment given in the Division Court, and was consequently a defence arising after action brought; and such payment and judgment could not have relation back to the time of service of the summons; and therefore, it having been adjudged in this action that the plaintiff was entitled to the amount claimed by him, less the $57.50, the action was properly brought in a County Court, and the plaintiff was entitled to costs on the scale of that Court. *Pickard* v. *Time*, 20 Occ. N. 118, 19 P. R. 109.

4. County Court — *Payment into Court—Amount—Acceptance by plaintiff—Order for set-off — Finality — Appeal.*]—The plaintiff in an action in a County Court claimed $140, the balance alleged to be due upon the sale of a chattel, and the defendant brought into Court $95 in full of the plaintiff's cause of action, which the plaintiff accepted in due time. The Judge of the County Court thereupon made a summary order allowing the defendant to set off his costs incurred in the County Court in excess of such costs as he would have incurred in a Division Court against the costs of the plaintiff, and to enter judgment and issue execution for the excess, if any, of the costs of the defendant over and above the costs of the plaintiff.

Held, that the plaintiff was entitled to tax his costs of the action according to the County Court scale, irrespective of the amount paid into Court and accepted by him in satisfaction of his claim; and the plaintiff being entitled to his costs by the express provision of Rule 425 (which is not qualified by Rule 1130), they were not subject to the discretion of the Judge.

Held, also, that the order of the Judge was in its nature final, and therefore appealable under s. 52 of the County Courts Act, R. S. O. c. 55. *Babcock* v. *Standish*, 20 Occ. N. 329, 19 P. R. 195.

5. Drainage Act—*Reference.*] — Section 113 of the Drainage Act, R. S. O. c. 226, providing that the tariff of the County Court shall be the tariff of costs under that Act, applies only to actions which ought properly to have been instituted by notice under s. 93, and not to actions referred under s. 94 which might properly have been brought at common law without reference to the Drainage Act, and which are referred to the Referee because the Court thinks they may be more conveniently disposed of by him. *McCulloch* v. *Township of Caledonia*, 20 Occ. N. 95, 19 P. R. 115.

6. Drainage Act—*Reference.*]—Where an action is brought to recover damages for injury to property by the construction of drainage works, and the claim is within the scope of s. 93 of the Drainage Act, R. S. O. c. 226, under which proceedings before the Drainage Referee may be taken without bringing an action, and an order is made referring the action to the Referee for trial, the costs should be taxed according to the tariff of the County Courts, under s. 113. *Moke* v. *Township of Osnabruck*, 20 Occ. N. 103, 19 P. R. 117.

7. Drainage Act—*Reference—Appeal.*] —Having regard to ss. 111, 112, and 113 of the Municipal Drainage Act, R. S. O. c. 226, and no tariffs of fees having been framed thereunder, the tariff of the County Courts applies not only to proceedings before the Drainage Referee, but to appeals from his decisions; and therefore the basis of taxation of the costs of an appeal to the Court of Appeal from the decision of the Referee should be the County Courts tariff. *In re Township of Metcalfe and Townships of Adelaide and Warwick, In re Township of Colchester North and Township of Gosfield North*, 20 Occ. N. 329, 19 P. R. 188.

8. Goods sold—*Amount in controversy —Change pendente lite—Appeal for costs.*] —The plaintiffs brought an action in a County Court for $175.55, the price of goods sold. The defendants had rejected the goods on the ground that they were not up to sample. After delivery of the statement of claim the plaintiffs sold the goods, and delivered an amended statement of claim, in which they gave the defendants credit for the proceeds of the sale, and proceeded with their action for the balance $77.90. The trial Judge found that the goods were equal to sample, and gave the plaintiffs judgment for $77.90.

As to costs he held that by their amended statement of claim the plaintiffs' cause of action became an entirely new one, and solely one within the jurisdiction of a Division Court, and for this reason they were entitled only to Division Court costs, and the defendants were entitled to set off the excess of their costs incurred in the County Court.

Held, that an appeal lay to a Divisional Court, notwithstanding that costs only were involved, because the judgment appealed from shewed that the trial Judge had proceeded upon a wrong principle.

Held, also, that the plaintiffs, having properly brought their action in the County Court, should not be deprived of their costs of such action by what they had done *pendente lite*, and were entitled to costs on the County Court scale. *Grove* v. *Bender*, 20 Occ. N. 95.

9. Will — *Class of action — Tariff.*]— The tariff of advocates includes in the first class of actions, personal, real, and mixed actions where the amount in controversy exceeds $1,000, and in the second class all actions which do not fall within the first class, and as to which no other provisions are made. An action to declare a will void and to establish an earlier will, although the plaintiff, if successful, would indirectly obtain the right to an estate worth $15,000, falls within the second class. *Gaudry* v. *Dubois*, 2 Q. P. R. 403.

IV. Security for.

1. Absence from Province—*Change of residence.*]—The plaintiff was a non-resident of the Province. The defendant applied for an order for a stay of proceedings until security for costs should be given. At the return of the summons, on shewing cause, an affidavit of the plaintiff was read in which she stated that she had, after service of the writ of summons, moved into the Province, and intended residing in the Province until after the termination of her suit.

Held, that the defendant was not entitled to security for costs. *Violette* v. *Martin*, 20 Occ. N. 88.

2. Absence from Province — *Evidence—Burden of proof—Bailiff's return.*]—Where a dilatory exception was made by the defendant alleging that the plaintiff had left the Province since the institution of the action, and asking for security for costs before pleading, the bailiff's return upon a subpoena, to the effect that he was unable to find the plaintiff, and that he had been informed that the plaintiff had left the Province, was sufficient, at the hearing of the exception, to throw the burden of proof upon the plaintiff to show that he was still domiciled in the Province. *Beamott* v. *Bartsky*, 3 Q. P. R. 192.

3. Appeal to Divisional Court, Ontario.]—Rule 825, providing that no security for costs shall be required on a motion or appeal to a Divisional Court, does not preclude a defendant from obtaining an order for security for costs where the plaintiff has taken up his residence abroad after a judgment dismissing his action without costs, from which his appeal to a Divisional Court is pending.

Arnold v. *Van Tuyl*, 30 O. R. 663, distinguished. *Tanner* v. *Weiland*, 20 Occ. N. 175, 19 P. R. 149.

4. Appeal to full Court, B.C.]—The amount of security for costs on appeals to the full Court not being fixed by the Rules:—*Held*, that in ordinary cases it should be $150 in appeals generally, $75 in interlocutory appeals, both Supreme and County Court, and $100 in County Court appeals not interlocutory. *Rogers* v. *Reed*, 7 Brit. Col. L. R. 79.

5. Application—*Forum.*] — Applications for security for costs of appeal to the full Court should be made to a Judge in Chambers and not to the full Court. *Rogers* v. *Reed*, 7 Brit. Col. L. R. 183.

6. Deposit in instalments — *Additional security.*]—Under Art. 227, C. C. P., the Judge is authorized to order the security to meet the costs incurred on a petition in improbation to be deposited in portions from time to time as necessity may arise, and an additional deposit may at any time be ordered where it appears that the sum already deposited is insufficient. *Auclair* v. *Nadon*, Q. R. 17 S. C. 200.

7. Executor — *Residence abroad.*] — When several executors, one of whom resides out of the Province of Quebec, bring an action as executors representing an action in that Province, the defendant cannot exact security from the foreign executor, the estate being the real party, and the heirs represented by the executors, in the absence of an allegation to the contrary, being considered as resident in the Province of Quebec. *Hart* v. *Dubreuil*, Q. R. 17 S. C. 371.

8. Foreign company.]— Summons for security for costs from the plaintiff, a company incorporated in the State of Washington, and having its head office in Seattle. The company owned a steamer running between Seattle and

Victoria, and had an office in Victoria managed by a freight and passenger agent, who devoted his whole time to the business of the company in Victoria, and who was paid a salary by the company. Rent and all office expenses were paid by the company, which was not licensed or registered in British Columbia.

Held, that the company was a foreign company within the meaning of s. 144 of the Companies Act, and was bound to give security for costs.

La Bourgogne, [1899] P. 1, [1899] A. C. 431, considered. *Alaska Steamship Co.*, v. *Macaulay*, 20 Occ. N. 448, 7 Brit. Col. L. R. 338.

9. Foreign company — *Joint plaintiffs.*] — *Held*, that an extra-provincial company must give security for costs under R. S. B. C. 1897 c. 44, s. 144, notwithstanding it is suing along with a resident of the Province and has assets within the Province. *McClary* v. *Howland*, 20 Occ. N. 396, 7 Brit. Col. L. R. 299.

10. Foreign intervenant.]—Whatever may be the purpose for which a foreign intervenant seeks to intervene in a pending suit, he can always be bound to give security for costs and produce a power of attorney. *De Martigny* v. *La Société Charitable de l'Asile de Nuit à Paris*, 2 Q. P. R. 394.

11. Garnishment.]—Where the garnishor resides out of the Province, the garnishee is entitled to security for costs of the proceeding against him in respect of the debt attached (which proceeding is an "action" in which the judgment is sought), and an order will therefore be granted after the garnishee has made his declaration and before it has been contested. *Compagnie Générale d'Importation* v. *Bilodeau*, 3 Q. P. R. 189.

12. Insolvency—*Absent contestant.*]—One who, residing abroad, contests the schedule of an insolvent is obliged to furnish security for costs and to file a power of attorney. *In re Lewis and Murray*, 3 Q. P. R. 145.

13. Procuration—*Costs of motion.*]—The defendant is entitled to the costs of his motion if he asks the production of a power of attorney at the same time as security for costs. The costs follow the event of the action where the defendant asks only security for costs without power of attorney. *Steinfeld* v. *Marquis*, 3 Q. P. R. 237.

14. Rescission of order—*Return of plaintiff — Terms.*]—Interlocutory orders may always be rescinded by the Court when the reasons for them have ceased to exist.—A plaintiff who has been ordered to furnish security for costs and procuration may be relieved from the obligation if he establishes that he has since fixed his place of abode in the Province, where he intends to remain permanently.—A plaintiff so discharged from the obligation of furnishing security and *procuration* should bear the defendant's costs of obtaining the original order and the costs of the petition for rescission. *Poole* v. *Hogan*, 3 Q. P. R. 197.

15. Residence of plaintiff—*Place of business.*]—Plaintiffs living in another Province must give security for costs although they have a place of business in the Province of Quebec. *Ross* v. *International Hydraulic Co.*, 3 Q. P. R. 75.

16. Residence of plaintiff—*Place of business—Costs of motion.*]—Plaintiffs described in the writ of summons as of a place outside the Province of Quebec, and carrying on business as partners in the city and district of Montreal, will be required, upon a motion in that behalf, to give security for costs and produce a power of attorney.—In such circumstances the plaintiffs if they oppose the motion will be mulcted in the costs of it. *Sapery* v. *Gagnon*, 3 Q. P. R. 57.

17. Residence of plaintiff—*Statement on writ—Deposit.*]—When it appears by the description of the plaintiff upon the writ itself that the defendant is entitled to security for costs and to the production of a power of attorney, it is not necessary to make a deposit with a motion for security. *Roy* v. *Lamontagne*, 3 Q. P. R. 253.

18. Residence out of Ontario — "*Ordinarily resident.*"]—Rule 1198 provides that security for costs may be ordered, among other cases, in the following: "(*a*) where the plaintiff resides out of Ontario; (*b*) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario."

The defendant's affidavit stated that the plaintiff was now residing out of the jurisdiction, and also that he had no certain place of abode within the jurisdiction; that he had hitherto resided out of the jurisdiction; and at the conclusion of the pending suit intended to reside out of the jurisdiction of the Court. The plaintiff's affidavit stated that he had not for the past year, nor had he now, any fixed or ordinary place of abode either in or out of the Province of Ontario, his occupation requiring that he should be from time to time in England, the Province of Ontario, and the Province of New Brunswick.

Held, that the actual residence abroad was still what *prima facie* entitled the defendant to security, and the plaintiff could not answer the application by shewing that he had no fixed residence at all.

Denier v. *Marks*, 18 P. R. 465, 19 Occ. N. 229, overruled. *Allcroft* v. *Morrison*, 20 Occ. N. 31, 19 P. R. 59.

See APPEAL, XV.—EVIDENCE, VI. 2, 3 —MUNICIPAL ELECTIONS, I. 9, 10—PARLIAMENTARY ELECTIONS, II. 1 — STATUTES, II. 2.

V. SET-OFF.

1. Counterclaim — *Relief obtainable without cross-action—Interlocutory costs — Order of revivor.*]—The counterclaim of a defendant, properly so-called, is a claim by the defendant for a relief which cannot be obtained by him in the action; and calling a claim made by the defendant a counterclaim cannot make it one.

The plaintiff claimed a declaration that his interest as a chargee upon land could not be sold under the power in the defendant's mortgage upon such land, and, in the alternative, that he was entitled to redeem the defendant. By her pleading in answer the defendant alleged certain facts justifying her right to exercise the power of sale, and "by way of counterclaim" claimed payment of her mortgage, sale or foreclosure, possession, costs, and damages. The action was at the trial dismissed with costs, and the counterclaim was also dismissed with costs, the defendant not desiring a foreclosure, which she was offered.

Held, that the relief claimed by the defendant was obtainable by her in the action brought against her, and was not the subject of a cross-action or counterclaim; and the only costs taxable by the plaintiff against the defendant were such costs as were occasioned to the plaintiff by reason of the claim made by the defendant, treating it as a claim properly made in the action and dismissed; and such costs should be set off *pro tanto* against the defendant's costs of the dismissal of the action. The judgment dismissing the "counterclaim" with costs meant that such costs should be taxed as were appropriate to it in its true character.

Semble, that in this Province the law as to set-off is different from the English law, and here a set-off should not be treated as a counterclaim nor be pleaded as such.

Held, also, that such costs were interlocutory costs within the meaning of Rule 1165; and, if not, that they were costs falling within Rule 1164, and subject to the discretion of the taxing officer in setting them off against the defendant's costs of the action.

Held, also, that costs of an order of revivor obtained by the plaintiff after judgment in order to tax his costs should be taxed to him and added to his other costs and setoff against the defendant's costs. *Girardot* v. *Welton*, 20 Occ. N. 231, 257, 19 P. R. 162, 201.

2. County Court—*Appeal—Forum.*]—This action was brought in a County Court for alleged false imprisonment. The plaintiff made a motion to strike out the defendant's notice of defence, which was granted. The defendant appealed against the order to the Supreme Court, and the appeal was allowed with costs. Subsequently the plaintiff secured a judgment.

This was an application by the defendant for an order to set off his costs of appeal against the plaintiff's judgment.

Held, that the application should be to the County Court: s. 75 of 60 V. c. 28. *Anderson* v. *Shaw*, 20 Occ. N. 18.

VI. SUCCESSFUL PARTY ENTITLED TO.

1. Acceptance of money paid into Court—*Notice.*] — After the full Court had rendered judgment (20 Occ. N. 136), reversing the decision of Henry, J., (19 Occ. N. 400), the plaintiff delivered a reply accepting the money paid into Court. The amount paid in was $1. This reduced the action to a question of costs.

Held, that Order 22, Rule 6 (b), latter part, applied to this case. It was the case of a delivery of a reply accepting the money and not a case for notice. This was not a case where the plaintiff should be deprived of his costs. *Miller* v. *Archibald*, 20 Occ. N. 356.

2. Depriving successful party of.] —*Held*, varying the decision in Q. R. 14 S. C. 153, that the consanguinity of the parties, the state of their fortunes (*e.g.*, the poverty of the losing party and wealth of the opposite party), and the good faith of the party who fails, are not sufficient reasons for saving that party from being mulct in costs. *Claude* v. *Claude*, Q. R. 17 S. C. 130.

3. Order for payment by successful party — *Municipal corporations — Recount of ballots.*]—Under s. 372 of the Municipal Act, R. S. O. c. 223, a County Court Judge, on a scrutiny of the ballots cast on the voting for a bonus by-law, cannot award costs against the

corporation if it be successful in upholding the by-law. *Township of Aldborough* v. *Schmeltz*, 32 O. R. 64.

4. Small verdict—*Slander.*]—Where, in an action of slander, the jury returned a verdict for the plaintiff for $1, the trial Judge refused to deprive the plaintiff of costs, his conduct not having been reprehensible, and the small verdict being explained by the condition of the defendant at the time the words were uttered. *Bell* v. *Wilson*, 20 Occ. N. 230, 19 P. R. 167.

VII. Taxation of—Items.

1. Affidavits—*Interlocutory motion.*]—Where an interlocutory motion is dismissed upon preliminary objections, the taxing officer has a discretion to disallow to the party opposing it the costs of affidavits filed in answer to it. *Whitewood* v. *Whitewood*, 20 Occ. N. 254, 19 P. R. 183.

2. Appeal from interlocutory orders—*Inscription—Factum — Vacations au greffe—Consolidation of actions — Counsel fees.*] — Upon an application for revision of the taxation of three bills of costs in three appeals from orders declaring sufficient the particulars furnished by the respondents, which orders were reversed on appeal:—*Held*, that the appellants were entitled to their disbursements and fees relating to the inscription of the appeals, which is as necessary for interlocutory appeals as for those from final judgments.—2. That they were entitled also to disbursements and fees in respect of factums, if factums were produced.—3. That they were entitled also to fees for day's time at the record office.—4. *Quære*, whether, if several causes have been consolidated for the purpose of pleading and factums, there should be several counsel fees or only one. *Paquet* v. *Taché*, 2 Q. P. R. 380.

3. Counsel fees.]—Motion to review taxation of costs of the plaintiff, the wife, taxed as between solicitor and client, to be paid by the defendant, the husband.

The Registrar allowed retainer and other fees to counsel in addition to the proctor, who also acted as counsel.

Held, as the case was not one in which second counsel could be considered as reasonably necessary, that the items should be disallowed. *Bell* v. *Bell*, 20 Occ. N. 20.

(See *Robock* v. *Peters*, 20 Occ. N. 421, 13 Man. L. R. 124.)

4. Counsel fees — *Discontinuance — Trial.*]—If an action is discontinued with costs before the day fixed for hearing, the plaintiff asking and obtaining a certificate of his discontinuance at the time the cause is called for trial, the defendant has no rght to the counsel fee *d'enquête* fixed by item 32 of the tariff. *Lee Chu* v. *Carpenter*, 3 Q. P. R. 70.

5. Counsel fees—*Dismissal of action—Exception — Hearing.*]—When an action has been dismissed upon an exception to the form, in respect of which there has been an *enquête* and a hearing, the defendant is entitled to the fees upon an *enquête* and hearing, over and above the fee provided by Art. 7 of the tariff. *Lapointe* v. *St. Onge*, 3 Q. P. R. 314.

6. Counsel fees—*Dismissal of action —Exception as to form.*]—If an action is dismissed upon exception to the form, the counsel fee allowed to the defendant will be that mentioned in Art. 7 of the Superior Court tariff, and not the fee upon a simple motion. *Plourde* v. *Bank of Montreal*, 2 Q. P. R. 496.

7. Counsel fees — *Motion to enforce award.*]—The counsel fee upon a motion to enter judgment in terms of an award made by arbitrators of the Grain Market Association of Montreal should not be the fee mentioned in Art. 4 of the tariff of the Superior Court as in the case of judgment rendered in a cause after setting down for hearing on the merits, but the fee mentioned in Art. 28 of the tariff, as upon a motion. *Ward* v. *Goodall*, 2 Q. P. R. 444.

8. Counsel fees—*Petition for revision of voters' list.*]—In the case of a petition for the revision of a voters' list which has been granted, the respondent having appeared and cross-examined the petitioner's witnesses, but having neither pleaded in writing nor examined witnesses on his own behalf, the petitioner will not be entitled to a counsel fee as in a contested action, but only to a fee appropriate to a case heard *ex parte*. *Larchevêque* v. *Corporation of St. Leonard de Port Maurice*, 3 Q. P. R. 293.

9. Counsel fees — *Preliminary exception.*]—In spite of the fact that preliminary exceptions are now made by motion, the fee provided by Art. 7 of the tariff of advocates in the Superior Court for a case in which the action succeeds or is dismissed after a plea other than a plea to the merits, and without *enquête*, continues in force. *Plourde* v. *Bank of Montreal*, Q. R. 17 S. C. 291.

10. Counsel fees—*Review—Motion.*]—When an inscription in review is dismissed upon motion, the fee will be that of an action settled before hearing, and not that of a motion only. *Renault* v. *Gagnon*, 3 Q. P. R. 259.

11. Counsel fees—*Trial—Class of action—Garantie.*]—A counsel fee at the hearing will not be allowed upon taxation unless there has in fact been a hearing.—2. If an action *en garantie* is dismissed because the plaintiff in the principal action is in default for not proceeding with his demand, the class of the action *en garantie* (brought up on review and dismissed by the Superior Court) will be that of the principal demand, and not that of an action for the amount of the costs that the plaintiff *en garantie* has to pay in consequence of the dismissal of his action. *Walker* v. *La Banque Nationale*, 3 Q. P. R. 47.

12. Documents — *Notary.*]—The expense of making a copy of a deed which is part of the title of him who produces it cannot be taxed against the opposite party unless the copy has been made for the express purpose of the suit.—The costs of steps taken by a notary in searching for documents to be produced in the cause cannot be taxed. *Lavoignat* v. *Mackay*, Q. R. 17 S. C. 382.

13. Fee of commissaire - enquêteur.]—A deputy-prothonotary who has been sworn as *commissaire-enquêteur* and as such has taken the examination of a witness is entitled to the fee therefor; and it will be allowed on taxation to the party paying it. *MacDonald* v. *Migneron*, 3 Q. P. R. 156.

14. Motion to allow preliminary exceptions.]—The fees of the prothonotary and of the attorney upon a motion to allow a preliminary exception (whether in a matter of form, going to the jurisdiction, dilatory, or otherwise), even when such motion is granted and the action dismissed, should be such fees as are taxable upon an ordinary simple motion, according to the class of action: Art. 28 of the tariff of advocates' fees (see Rule of Practice, No. 40). *Vezina* v. *Martin*, 2 Q. P. R. 361.

15. Petition — *Useless proceedings.*]—Upon a petition for payment out of money deposited with the Provincial Treasurer pursuant to Art. 1198, R. S. Q., the fee allowed will be that upon a petition, and the bill of costs will not be taxed as in an action.—*Semble*, that motions to debar a party from pleading, to set down the cause, and to place the cause *en délibéré suivant ses errements*, are unnecessary proceedings upon such a petition. *Dauphinais* v. *Bousquet*, 2 Q. P. R. 511.

16. Witness fees — *Adjournment.*]—Where one party asks the postponement of the trial of the cause because he is not ready to proceed, the opposite party has the right to tax witness fees for himself as an ordinary witness. *Gagnon* v. *Simard*, 2 Q. P. R. 365.

17. Witness fees—*Party—Manager of company—Notice—Waiver.*]—Witness fees cannot be taxed in respect of the manager of a company party to the action unless he is subpœnaed as a witness by the adverse party.—2. When a witness has not been allowed for at the time of the trial, he should not be afterwards except upon notice to the party calling him and the adverse party, the latter being interested, especially in the case of a witness who comes from abroad, in keeping down the costs which are charged upon him by the result of the taxation.—3. A witness who is a party to the action is regarded as having renounced his fees if he does not demand them until after judgment rendered against the opposite party. *Vive Camera Co.* v. *Hogg*, 2 Q. P. R. 423.

18. Witness fees—*Parties—Postponement of trial.*]—The law allows the parties to an action to be witnesses, but ordinarily their fees as witnesses cannot be taxed against the opposite party. However, if one of them obtains a postponement of the trial because he is not ready, the other may tax fees for himself as an ordinary witness. *Gagnon* v. *Simard*, Q. R. 16 S. C. 336.

See APPEAL, IX. 7, X. 6—SOLICITOR, V.

VIII. TAXATION OF — RIGHT OF APPEAL FROM.

Mortgagor and mortgagee.]—No appeal lies from the taxation of a mortgagee's costs of proceedings under the power of sale in a mortgage, had under R. S. O. c. 121, s. 30. *In re Vanluven and Walker*, 20 Occ. N. 388, 19 P. R. 216.

IX. OTHER CASES.

1. Defendants severing—*Liability to plaintiff.*]—Reference to a Judge under Rule 801 by the District Registrar at Nelson on taxation of a bill of costs. The defendants separated in their defence, and the judgment was for the plaintiff against all the defendants.

Held, that the plaintiff was entitled to costs against the defendants jointly, and each defendant was liable for the costs of his separate defence, but not liable for any costs occasioned solely by the other.

Stumm v. *Dixon*, 22 Q. B. D. 99, followed. *Merchants Bank* v. *Houston*, 20 Occ. N. 48, 7 Brit. Col. L. R. 352.

2. Discontinuance — *Judgment.*] — When a party who discontinues does not pay the costs at the time of discontinuance, the opposite party is entitled, upon setting down the cause, to a judgment for costs. *Star Iron Co.* v. *Baxter*, 3 Q. P. R. 178.

3. Garnishee summons — *County Court—Payment.*]—Where a defendant in a County Court action pays the full amount of the claim and costs called for in a default summons within the five days' limit mentioned in the summons, the plaintiff will not be allowed the costs of a garnishee summons. *Shawnigan Lake Lumber Co.* v. *Fairfull*, 7 Brit. Col. L. R. 58.

4. Infringement of copyright—*Consent judgment—Damages—Payment into Court.*] — Where judgment was pronounced by consent declaring that the defendant had infringed the plaintiffs' copyright, restraining him from continuing to infringe, and directing a reference to ascertain the damages sustained by reason of the infringement, and the Master found that the damages were only $6.70, and also reported specially that the plaintiffs were aware before action that the defendant was willing to hand over all copies of and to stop selling or giving away the publications in question, but the plaintiffs demanded $100 compensation, and that after action the defendant offered to pay $25 for damages and costs, and to deliver up any of the publications on hand, and to give an undertaking that there would be no further infringement, but the plaintiffs did not accept the offer:—

Held, that the plaintiffs were entitled to the costs of the action.

Cooper v. *Whittingham*, 15 Ch. D. 501, *Upmann* v. *Forester*, 24 Ch. D. 231, and *Wittman* v. *Oppenheim*, 27 Ch. D. 260, followed.

And also to the costs of the reference, the defendant not having when consenting to judgment offered to pay a fixed sum for damages and to pay it into Court. *Anglo-Canadian Music Publishing Association* v. *Somerville*, 20 Occ. N. 120, 19 P. R. 113.

5. Interest on—*Supreme Court of Canada.*]—The plaintiff was for the first time condemned by the Supreme Court of Canada to pay the costs in the Superior Court. *Held*, that the judgment of the Supreme Court was the judgment granting the costs under the terms of Art. 556, C. P. C., and that interest was due upon such costs from the date of the Supreme Court judgment only. *Gibsone* v. *Quebec and Montmorency R. W. Co.*, Q. R. 17 S. C. 74.

6. Leave to proceed in forma pauperis—*Defence.*]—When a plaintiff who asks leave to proceed *in formâ pauperis* discloses a good cause of action and shews that he has no means of paying disbursements, leave ought to be granted, even if the defendant alleges facts which should be sufficient to defeat his action.—Upon the motion for leave the Judge cannot be called upon to decide whether the ground of defence alleged is well founded. *Paquette* v. *Pyke*, Q. R. 16 S. C. 403.

7. Mechanic's lien — *Appeal.*]—Sections 41 and 42 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. c. 153, limiting "the costs of the action under the Act" to twenty-five per cent. of the judgment, besides actual disbursements, do not apply to the costs of an appeal from the decision of the Judge or officer trying the action.

Semble, that the costs of such an appeal are within the scope of s. 45. *Gearing* v. *Robinson*, 20 Occ. N. 335, 19 P. R. 192.

8. Opposition—*Seizure — Prior notice of claim.*]—The plaintiff caused certain effects belonging to the claimant to be seized. Before the seizure the claimant, who was the son of the defendant and lived at his house, went to the plaintiff and forbade him, in the presence of a witness whom he had brought with him for the purpose, to make a seizure at the house of the defendant, warning the plaintiff that the effects belonged to him (the claimant), and that he would hold the plaintiff responsible for any expense which he should occasion. In his claim or *opposition* the claimant specially alleged that the plaintiff knew that the effects did not belong to the defendant. The plaintiff did not contest the opposition except as to costs, alleging that he had seized in good faith, and proving that the defendant had asserted that he was the owner of one of the effects seized. *Held*, that, in these circumstances, the plaintiff must pay the costs of the opposition. *Descheneau* v. *Grandmont*, 2 Q. P. R. 419.

9. Preliminary question of law—*Trial.*]—Under Rule 233 the plaintiff may have a point of law raised on the pleadings disposed of before trial, but there is no duty cast on a defendant to do so, and therefore where a defendant succeeds at the trial on a point of law which could have been so disposed of, he is entitled to the usual costs of trial. *Hall* v. *The Queen*, 7 Brit. Col. L. R. 120.

10. Setting aside regular judgment by default — *Terms.*] — Action brought in a County Court. Judgment for the plaintiff was entered regularly for default of defence. The defendants were let in to defend. The plaintiff appealed, upon the ground that the defendants' affidavit was insufficient. The appeal was allowed, and the defendants permitted to file a further affidavit: see 30 N. S. Reps. 429. The defendants again applied before the Judge, with a fresh affidavit, to be let in to defend. The plaintiff read affidavits in answer, and asked leave to cross-examine the defendants' deponent on his affidavit in support of the application. Refused. The Judge allowed this second application of the defendants, and, because the plaintiff had unreasonably and oppressively opposed the application, and because the defendants had to pay the costs of the first appeal, ordered that the plaintiff pay the defendants the costs of the second application before him. On appeal it was ordered that the judgment be opened up on the terms that the defendants pay the plaintiff's costs thrown away in opening up the judgment and their own costs of the application to open up the judgment. *Piper* v. *King's Dyspepsia Cure Co.*, 20 Occ. N. 407.

11. Supreme Court of Canada—*Execution — Leave.*] — An appeal to the Supreme Court of Canada was allowed with costs to be paid to the appellant by a corporation.

Upon the *ex parte* application of the appellant this Court below granted leave to issue execution for these costs, expressing a doubt as to the necessity for obtaining leave. *Ex p. Jones*, 20 Occ. N. 87.

12. "Triple costs" — *Meaning of.*]— Where an action begun by virtue of Art. 2550, R. S. Q., has been dismissed with costs, the defendant recovers against the plaintiff triple costs, that is to say, three times the amount of the bill of costs taxed. *Luneau* v. *Luneau*, 2 Q. P. R. 454.

COUNCILLORS.

See MUNICIPAL CORPORATIONS, VII.—MUNICIPAL ELECTIONS, II. 2, 3.

COUNSEL.

See MINES AND MINERALS, I. 7.

COUNSEL FEES.

See COSTS, VII.

COUNTERCLAIM.

See PLEADING, I.

COUNTERFEITING.

See CRIMINAL LAW, VII. 9.

COUNTY COURT JUDGE.

Substitute—*Request — Jurisdiction.*]—A County Court Judge for one county was requested by a Supreme Court Judge, being the acting County Court Judge for another county, to sit in lieu of himself whenever absent.

Held, that the County Court Judge had no jurisdiction to sit by virtue of such request, and that s. 8 of the County Courts Act empowers only a County Court Judge to make such request. *Bell & Flett* v. *Mitchell—British Columbia Mills, Timber, and Trading Co.* v. *Mitchell*, 1 Brit. Col. L. R. 100.

See APPEAL, I. 4—MUNICIPAL CORPORATIONS, X. 1.

COUNTY COURTS.

See COURTS.

COURTS.

I. BRITISH COLUMBIA — COUNTY COURTS.

II. BRITISH COLUMBIA—SMALL DEBTS COURTS.

III. NORTH-WEST TERRITORIES — SUPREME COURT.

IV. ONTARIO—COUNTY AND DISTRICT COURTS.

V. ONTARIO—DIVISION COURTS.

VI. QUEBEC—CIRCUIT COURTS.

VII. QUEBEC—SUPERIOR COURT.

See APPEAL—PROHIBITION.

I. BRITISH COLUMBIA—COUNTY COURTS.

Action — *Transfer to Supreme Court—Extension of claim.*]—The plaintiff sued in a County Court for $950, and the action was transferred to the Supreme Court under s. 69 of the County Courts Act, the order providing that a statement of claim should be delivered, etc. The statement of claim when delivered claimed $3,000.

Held, that when an action has been so transferred, the plaintiff can extend his claim beyond the sum he originally claimed in the County Court. *Thurston* v. *Tattersall*, 20 Occ. N. 251, 7 Brit. Col. L. R. 160.

See COSTS, IX. 3 — COUNTY COURT JUDGE.

II. BRITISH COLUMBIA—SMALL DEBTS COURTS.

Jurisdiction of — *Debt — Mechanic's lien.*]—Appeal to the County Court of Atlin from a decision of a magistrate in a Small Debts Court in favour of the plaintiff in an action to enforce a mechanic's lien, under ss. 26 and 27 of the Mechanics' Lien Act.

Held, that an action to enforce a mechanic's lien is not one of debt within the meaning of s. 2 of the Small Debts Act. Appeal allowed. *Dillon* v. *Sinclair*, 20 Occ. N. 428, 7 Brit. Col. L. R. 328.

III. NORTH-WEST TERRITORIES — SUPREME COURT.

Certiorari—*Where returnable — Motion to quash conviction — Forum.*]—*Held*, following *Regina* v. *Beemer*, 15 O. R. 266, that a single Judge has no jurisdiction to hear and determine a motion to quash a conviction upon a writ of *certiorari*; and that such writs must be issued from the office of the Registrar and be made returnable before the Court *in banc*. *Regina* v. *Smith*, 1 Terr. L. R. 189. But see now the new section substituted for s. 52 of the N.-W. T. Act, by 54 & 55 V. c. 22, s. 7.

IV. ONTARIO — COUNTY AND DISTRICT COURTS.

Jurisdiction of Judges — *Local Judges of High Court—Vendors and Purchasers Act — Costs.*] — *Held*, that the Judges of the District Courts appointed under the provisions of R. S. O. c. 109 are Judges of the High Court for the purposes of their jurisdiction in actions in the High Court, and may be styled "local Judges of the High Court," but that nowhere in any statute or Rule is any power or authority given to such Judges to deal with applications under the Vendors and Purchasers Act, or under the Land Titles Act; and, therefore, in this case the Judge making an order under the Acts had acted without jurisdiction.

An appeal was allowed, but, as the proceedings were taken on the consent of both parties, no costs were awarded. *In re Mitchell and Pioneer Steam Navigation Co.*, 20 Occ. N. 74, 31 O. R. 542.

See APPEAL, II. 1, VI. 2, 3, 4, 5, 6, XIII. 2—ATTACHMENT OF DEBTS, II, 6—COSTS, III. 2, 3, 4—PROHIBITION, 1.

V. ONTARIO—DIVISION COURTS.

1. New trial — *Time for moving.*]—Where at the sittings of a Division Court a case was "adjourned for plaintiff on payment of costs within ten days, otherwise judgment for the defendant:"—

Held, that the two weeks within which a motion could be made for a new trial (costs not being paid) did not commence to run until the expiration of the ten days, for until then there was no judgment. *Thompson* v. *McRae*, 20 Occ. N. 277, 31 O. R. 674.

2. Removal of plaint into High Court—*Discretion—Res judicata.*]—After a trial and judgment in a Division Court as to the right of a landlord to recover a month's rent under a lease, another action was brought for three months' subsequent rent, whereupon the defendant applied for an order in the nature of a *certiorari*, which was refused, on the ground that though the case might be of importance as affecting cases of a similar nature, that was not of itself sufficient ground for removing the action into the High Court, no difficult questions of law or fact appearing to be involved.

On appeal the judgment was affirmed, the Court holding that the granting of the order was in the discretion of the Judge, and moreover by the judgment of the Division Court in the first action the matter was *res judicata*. *In re Fraser* v. *Oberndorfer*, 20 Occ. N. 68.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 13 — COSTS, III. 3—MANDAMUS, 1—PROHIBITION, II.

VI. QUEBEC—CIRCUIT COURTS.

1. Jurisdiction—*Cancellation of lease—Damages.*]—An action for cancellation of a lease and for $85 damages is of the exclusive competence of the Circuit Court. *Yon* v. *Vallée*, Q. R. 17 S. C. 446, 2 Q. P. R. 562.

2. Jurisdiction—*Single Commissioner—Amount in controversy—Date of judgment—Reference to arbitration.*]—A judgment of the Court of Commissioners will not be removed upon certiorari

upon the ground that the single Commissioner who heard the case rendered the judgment in his own name instead of in that of the Court.—2. The Court of Commissioners has jurisdiction to adjudicate upon a demand for division of wood, where the value of the wood does not exceed $25.—3. Neglect to date a judgment is not sufficient to invalidate it, where the date appears elsewhere.—4. The Court of Commissioners can itself, and without exceeding its powers, refer a cause to arbitration. *Auger* v. *Lamoureux*, 2 Q. P. R. 527.

3. Territorial jurisdiction.] — A Commissioners' Court sitting at Longueuil cannot take cognizance of a suit begun against a person residing in the city of Montreal, where he is served, the Circuit Court at Montreal having sole jurisdiction in such a case. *Lapointe* v. *Viger*, Q. R. 17 S. C. 376, 3 Q. P. R. 37.

4. Territorial jurisdiction — *Cause of action—Carriers—Transit.*] — Where a carrier contracts in Montreal to carry a parcel from Montreal to St. Jerome, the freight to be paid at St. Jerome, and it is alleged that the package has been damaged in transit, the action for damages must be instituted in the district of Montreal, where the cause of action originated, and not in the district of Terrebonne, at St. Jerome, where freight is paid. *Petit* v. *Dominion Express Co.*, Q. R. 16 S. C. 434.

5. Territorial jurisdiction — *Cause of action—Sale of goods — Exception to jurisdiction—Costs.*]—A cause of action for goods sold to the defendant domiciled in the district of Terrebonne, by the traveller of the plaintiff, authorized by her to receive payment for her goods, less the freight which the defendant pays upon the goods, arises in the district of Terrebonne, and the record should be transmitted upon exception to the jurisdiction of the Circuit Court of the district of Montreal.—2. The fee of the defendant upon an exception to the jurisdiction sustained and transmission of the record ordered, should be that proper to an action dismissed after contestation. *Montreal Brewing Co.* v. *St. Vincent*, 2 Q. P. R. 363.

See also cases under VII.

See APPEAL, VIII., X. 3, 4.

VII. QUEBEC—SUPERIOR COURT.

1. Jurisdiction — *Amount in controversy.*]—The plaintiff, a member of a club, sued the club for a declaration that he was not obliged to pay the club the sum of $25 which the club had imposed upon members for one year only. *Held*, that the action was not to be regarded as one for the recovery of $25, and was not within the jurisdiction of the Circuit Court, but was properly brought in the Superior Court. *Beaudry* v. *Club St. Antoine*, 2 Q. P. R. 484.

2. Territorial jurisdiction — *Action against executor — Domicil of testator — Locus of property.*]—In an action proper for a Superior Court against an executor *en caducité de legs* and *en reddition de comptes*, the only Court which has jurisdiction is that of the district in which the domicil of the testator is situated, or that in which his property is situated; the facts that he died in another district and that the process in the action has been personally served upon the executor in that district, can make no difference as to the jurisdiction of the Court. *Béchard* v. *Bernier*, 3 Q. P. R. 36.

3. Territorial jurisdiction — *Cause of action—Award—Publication.*]—The Superior Court at Montreal cannot entertain an action to enforce an award, although the submission, the hearing, and the pronouncing of the award were in the district of Montreal, if the award was published to the defendants in another district, the whole cause of action in such case not having arisen in the district of Montreal. *Roman Catholic Episcopal Corporation of Nicolet* v. *Paquet*, Q. R. 17 S. C. 447, 3 Q. P. R. 144.

4. Transfer of action from Circuit Court—*Future rights—Annual allowance.*]—An action for an annual allowance for maintenance, which is for life, affects future rights, and therefore, by virtue of Art. 49, C. P. C., may be removed from a Circuit Court to the Superior Court. *Deschamps* v. *Deschamps*, 2 Q. P. R. 390.

5. Transfer of action from Circuit Court — *Future rights—Calls on shares.*]—An action claiming payment of a call on shares in a company may affect future rights within the meaning of Arts. 49 and 1130, C. P., and is therefore, such an action as may be removed from a Circuit Court into the Superior Court, if the fact of subscription for the shares is in dispute; *aliter*, if the defendant, without denying the fact of the subscription, alleges that he has paid the call, or that it has been remitted, or satisfied by set-off. *Dewitt - Langlois Milling Co.* v. *Fauteux*, Q. R. 16 S. C. 400.

See also cases under VI.

See APPEAL, X., XI.—LANDLORD AND TENANT, II. 5, V. 3, 4.

COVENANT.

Restraint of trade—*Breach—Action—Parties.*]—A covenant not to engage or be interested directly or indirectly, either by himself, or with, by, or through any other person, either as principal or agent or otherwise, in the business of a baker within a fixed radius, for a certain term, is broken by the covenantor assisting the owners of a similar business without remuneration.—One of several joint covenantees, in a covenant in restraint of trade, or an incorporated company to whom the interest of the covenantees in the business has been transferred, may, if interested in the good-will, maintain an action for an injunction against the covenantor for breach of the covenant, notwithstanding that the other covenantees have ceased to be interested in the business. *Parnell* v. *Dean*, 20 Occ. N. 119, 31 O. R. 517.

See CONTRACT, I. 8, I. 10—LANDLORD AND TENANT, III., VI. 3, VIII. 1—MORTGAGE, I.

CREDITORS' RELIEF ACT.

See RECEIVER, 1.

CRIMINAL LAW.

I. EVIDENCE.
II. OFFENCES—FORGERY.
III. OFFENCES—GAMING.
IV. OFFENCES—MANSLAUGHTER.
V. OFFENCES—RAPE.
VI. OFFENCES—THEFT.
VII. OTHER OFFENCES.
VIII. PROCEDURE.
IX. SUMMARY CONVICTION.
X. SUMMARY TRIAL.

See APPEAL, IX. 1—CANADA TEMPERANCE ACT — CERTIORARI — CONSTITUTIONAL LAW, 1—EXTRADITION—JUSTICE OF THE PEACE—MALICIOUS PROCEDURE, 2—PROHIBITION, III. 2.

I. EVIDENCE.

Wife of prisoner—*Indian marriage—English law.*] — The North-West Territories Act, R. S. C. c. 50, s. 11, provides that, with some limitations, the laws of England, as the same existed on the 15th July, 1870, should be in force in the Territories in so far as the same are applicable to the Territories.

Held, that the laws of England relating to the forms and ceremonies of marriage are not applicable to the Territories—certainly *quoad* the Indian population, and probably in any case.

On the trial of a prisoner, an Indian, on a criminal charge, the evidence of two Indian women, M. and K., was tendered for the defence. M. stated "that she was the wife of the prisoner; that he had two wives, and that K. was his other wife; that she, M., was his first wife; that she and the prisoner got married Indian fashion; that he promised to keep her all her life and she promised to stay with him, and that was the way the Indians got married; that he married the other woman last winter; that he and the other woman lived with each other and that he took her for a wife, and that was all about it.

Held, that the evidence quoted was sufficient evidence of a legally binding marriage between M. and the prisoner for the purpose of excluding the evidence of M. as being neither a competent nor a compellable witness against the prisoner on a criminal charge. See now 56 V. c. 31, s. 4 (D.) *Regina* v. *Nan-e-quis-a-ka*, 1 Terr. L. R. 211.

See also II. 1, III. 2, V., VI. 2, VII. 10, X.

II. OFFENCES—FORGERY.

1. Evidence — *Corroboration.*]—The prisoner was charged in the first count with forging the name of a superintendent of the N. W. M. Police to a requisition for transport, and in the second, with uttering the same knowing it to be forged.

Held, that the superintendent was not "a person interested, or supposed to be interested," within the meaning of the Criminal Procedure Act, R. S. C. c. 174, s. 218, and that therefore, his evidence did not require corroboration. *Regina* v. *Farrell*, 1 Terr. L. R. 166.

2. Indictment—*Criminal Code, s. 451.*]—In the crime of uttering a forged instrument, the knowledge by the utterer that the instrument uttered was forged and had been made with intent to defraud is an essential element, and, as every count of an indictment must contain a statement of all the essential ingredients which together constitute the offence charged in it, the omission of such essential averment renders the count null and void, and the defect cannot be corrected by the Court.—2. Upon the trial of an indictment for forging an instrument, it is not necessary to prove an intent to defraud any particular person: it is sufficient to allege and

prove that the accused did the act charged with an intent to defraud, and when the fraud has been carried out it need not appear on the face of the indictment in what manner and by what means the fraud was consummated. *Regina* v. *Weir*, Q. R. 9 Q. B. 253.

III. OFFENCES—GAMING.

1. Common gaming-house.] — The prisoner was lessee of a room to which the public had free access, and in which several people congregated and played a game called "black jack." There was no constant dealer, and the lessee got no benefit. The dealer (who is chosen on commencing by cutting the cards) has an advantage, and as a rule can keep the deal five or six minutes.

The prisoner was convicted, under s. 196 of the Code, of keeping a common gaming-house, and the Court of Criminal Appeal confirmed the conviction, holding that, as the dealer (banker) had an advantage over the other players, the game came under the provisions of s. 196. *Regina* v. *Petrie*, 20 Occ. N. 250, 7 Brit. Col. L. R. 176.

2. Common gaming-house—"Gain"—*Evidence.*]—In order to obtain, under s. 198 of the Criminal Code, a conviction of a person for keeping a disorderly house, to wit, a common gaming-house, as defined by s. 196 (*a*), the Crown must show by satisfactory evidence that the person charged is deriving some gain or profit from keeping the house, room, or place, and allowing games of chance to be played therein.

And where it was shown that the only source of profit to a person in whose room a game of cards was played for money stakes was a small deduction made (with the consent of the players, and not as a matter of right or a condition of any one being admitted to the game) from the total stakes upon the table at various times, for the ostensible purpose of paying for the refreshments provided, and it was not shown that the total sum derived from such deductions was more than sufficient to pay for the refreshments, the Judge refused to convict. *Regina* v. *Sanders*, 20 Occ. N. 213.

3. Stocks — *Broker.*]—A broker, who merely acts as such for two parties, one a buyer and the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission, and without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks or merchandise, is not liable to prosecution under s. 201 (*a*) and (*b*) of the Criminal Code of Canada, nor as accessory under s. 61. *Regina* v. *Dowd*, Q. R. 17 S. C. 61.

IV. OFFENCES—MANSLAUGHTER.

1. Indictment of corporation—*Punishment.*]—The defendants, a corporation, were indicted for that they unlawfully neglected, without lawful excuse, to take reasonable precautions and to use reasonable care in maintaining a bridge forming part of their railway which was used for hauling coal and carrying passengers, and that on the 17th August, 1898, a locomotive engine and several cars, then being run along said railway and across said bridge, owing to the rotten state of the timbers of the bridge, were precipitated into the valley underneath, thereby causing the death of certain persons. The defendants were found guilty and a fine of $5,000 was inflicted.

Held, per McColl, C.J., and Martin, J., on appeal, affirming the conviction, that such an indictment will lie against a corporation under s. 252 of the Code.

Per Drake and Irving, JJ., that such an indictment will not lie against a corporation.

Sections 191, 192, 213, 252, 639, and 713 of the Code considered.

A corporation cannot be indicted for manslaughter. *Regina* v. *Union Colliery Co.*, 20 Occ. N. 289, 7 Brit. Col. L. R. 247.

2. Indictment of corporation — *Punishment.*] — The defendant company was indicted, under ss. 213 and 220 of the Criminal Code, 1892, for negligence in maintaining machinery in a condition dangerous to life, resulting in the death of one of its employees.

There was also a count for manslaughter.

Held, that, notwithstanding s.-s. (*l*) of s. 3 of the Code, by virtue of which ss. 213 and 220 generally apply to corporations as well as individuals, an indictment would not lie against a corporation for manslaughter, and even if a corporation were indicted and convicted of such an offence, there was no provision of law under which any punishment could be imposed.

The punishment for manslaughter being imprisonment for life under s. 236 of the Code, s. 958 did not apply, and a fine could not be imposed in lieu of imprisonment. The general provision of s. 639 that, in case of the conviction of a corporation, the Court "may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations," could not be interpreted so as to affect or modify the positive enactment of s. 236. *Regina* v. *Great West Laundry Co.*, 20 Occ. N. 217, 13 Man. L. R. 66.

V. Offences—Rape.

Evidence — *Complaint — Interval — Action for damages.*] — On a trial for rape, the fact that the injured person made a complaint, and the particulars or details of the complaint, are admissible as evidence in chief for the prosecution to confirm the testimony of the injured person and disprove consent on her part; and among the particulars the name of the person whom she accused of the offence may be stated.—2. While the injured person should make her complaint as soon as possible after the commission of the offence, yet no specific time being fixed therefor by law, evidence may be admitted of a complaint made to her mother seven days after the offence; but the jury may and should weigh the interval which elapsed before complaint was made, when considering the probability of its truth.—3. Evidence that civil suits for damages based on the commission of a rape have been instituted by the tutor of the injured person on her behalf, and by her mother, is properly excluded as irrelevant on the trial for rape, unless it be first proved that the injured person and her mother had stated, or let it be inferred, that the prisoner was innocent of the offence charged, and they had appeared to be desirous of extorting money from him. In such case the fact that civil actions had been instituted would be corroborative evidence.—4. Evidence of a quarrel or wrangle between the injured person and her mother a week after the alleged offence, and of an assault committed by the daughter upon her mother, was properly excluded. *Regina* v. *Riendeau*, Q. R. 9 Q. B. 147.

VI. Offences—Theft.

1. Conviction of minor — *Recitals —Religious faith—Place and term of imprisonment.*] — The defendant was convicted before a magistrate for theft, and was sentenced to be imprisoned in the Halifax Industrial School for three years. By the Criminal Code, s. 10, the punishment for such an offence when the accused is under sixteen is imprisonment for not more than three months in the common gaol; but by 53 V. c. 37, s. 34 (D.), any boy, being a Protestant and a minor apparently under sixteen, convicted in Nova Scotia and liable to imprisonment, may be sentenced to be detained in the school for not less than two and not more than five years. *Held*, that it was not necessary in the conviction to recite the age of the defendant or the opinion of the magistrate as to his age; the power of determining the apparent age being given exclusively to the magistrate, it should be assumed that he has exercised it; the age of the accused and whether he is or is not a Protestant need not be inquired into on the trial of the offence, but would form a subject of inquiry after conviction and before sentence. *Regina* v. *Brine*, 33 N. S. Reps. 43.

2. Pocket-picking — *Evidence.*] — The prisoner was summarily tried and convicted of having stolen a pocket book containing money from the person of one Mrs. D.

The evidence shewed that Mrs. D. entered the grounds of an exhibition with a large number of people, and having in her pocket a purse containing the money mentioned; that she stopped in a crowd to watch something that attracted her attention; that there was a commotion in the crowd, during which the prisoner pushed her or was pushed against her; that just as this occurred a police constable saw the prisoner putting his hand in a fold of her dress which he took to be the situation of her pocket; that the purse was shortly afterwards missed, and the prisoner, being arrested after an interval, had upon him money in notes and silver, some of which were of the denominations of the money in Mrs. D.'s purse, but none of which could be identified as having been hers.

Held, that upon such evidence a jury should have been directed to acquit the prisoner. The evidence did not raise more than a mere suspicion against the prisoner and was not sufficient in law to warrant a conviction.

Conviction quashed. *Regina* v. *Winslow*, 20 Occ. N. 24, 12 Man. L. R. 649.

3. Summary trial—*Excessive penalty —Amendment—Discharge — Further detention.*] — The defendant was prosecuted for stealing $5 in money, the property of one J. M., contrary to the form of the statute, etc., and the charge was heard and determined in a summary way by a police magistrate.

Held, that the prosecution fell under s. 783 (*a*) of the Criminal Code, the value of the property being less than $10, and it not being charged that the offence was "stealing from the person;" and therefore s. 787 applied, and the magistrate had no power to impose a penalty of imprisonment for longer than six months.

The provisions of the Code respecting amendments to summary convictions do not apply to summary trials; and the provisions of s. 800 do not apply where the same infirmity is found in the conviction as in the commitment.

prove that the accused did the act charged with an intent to defraud, and when the fraud has been carried out it need not appear on the face of the indictment in what manner and by what means the fraud was consummated. *Regina* v. *Weir*, Q. R. 9 Q. B. 253.

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The evidence shewed that Mrs. D. entered the grounds of an exhibition with a large number of people, and having in her pocket a purse containing the money mentioned; that she stopped in a crowd to watch something that attracted her attention; that there was a commotion in the crowd, during which the prisoner pushed her or was pushed against her; that just as this occurred a police constable saw the prisoner putting his hand in a fold of her dress which he took to be the situation of her pocket; that the purse was shortly afterwards missed, and the prisoner, being arrested after an interval, had upon him money in notes and silver, some of which were of the denominations of the money in Mrs. D.'s purse, but none of which could be identified as having been hers.

Held, that upon such evidence a jury should have been directed to acquit the prisoner. The evidence did not raise more than a mere suspicion against the prisoner and was not sufficient in law to warrant a conviction.

Conviction quashed. *Regina* v. *Winslow*, 20 Occ. N. 24, 12 Man. L. R. 649.

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Held, that the prosecution fell under s. 783 (*a*) of the Criminal Code, the value of the property being less than $10, and it not being charged that the offence was "stealing from the person;" and therefore s. 787 applied, and the magistrate had no power to impose a penalty of imprisonment for longer than six months.

The provisions of the Code respecting amendments to summary convictions do not apply to summary trials; and the provisions of s. 800 do not apply where the same infirmity is found in the conviction as in the commitment.

The conviction and commitment were bad for imposing an unauthorized penalty; the defendant was entitled to be discharged upon *habeas corpus*; and an order should not be made under s. 752 for his further detention. *Regina* v. *Randolph*, 20 Occ. N. 439, 32 O. R. 212.

4. Warrant of commitment—*Form of.*]—The warrant of commitment stated that the defendant "did steal a certain waggon," etc.—without alleging the absence of colour of right, and without laying in any person the property in the waggon. *Held*, that the warrant contained a sufficiently definite statement of the alleged crime of theft. *Regina* v. *Leet*, 20 Occ. N. 46.

VII. Other Offences.

1. Aiding deserter—*Conviction—Uncertainty—Penalty—Costs.*]—The prisoner was convicted under s. 73 (*b*) of the Criminal Code, which is as follows:—"Everyone is guilty of an indictable offence who * * * conceals, receives, or assists any deserter from Her Majesty's military or naval service, knowing him to be such deserter." The penalty on summary conviction is "not exceeding $200, and not less than $80 and costs," and in default of payment, imprisonment for any term not exceeding six months. The magistrate imposed a penalty of $100, and in default of payment four months' imprisonment.

Held, that the words of the Act do not each describe a separate offence, but are merely an amplification of language to cover all shades or description of the same kind of offence—that of giving aid to a deserter.

Regina v. *Gibson*, 29 O. R. 663, distinguished.

At any rate s. 907 of the Code would cure any uncertainty.

2. That the penalty must be disposed of under ss. 927 and 928 of the Code, and was properly directed "to be paid and applied according to law."

3. That it was not necessary to award costs against the defendant, the words of the statute meaning that $200 was the highest penalty, and "$80 and costs" the lowest penalty. The fine was fixed at $100 and no costs, and the magistrate acted within his discretion in not awarding costs. *In re Baker*, 20 Occ. N. 16.

2. Bawdy-house—*Accessory—Lessor.*]—A person who leases his house to another to be used for purposes of prostitution, or who leases his house knowing that it is to be so used, makes himself, under the provisions of s. 61 (*b*) of the Criminal Code, a party to and guilty of the offence of keeping a disorderly house, committed by his lessee subsequently to the lease of the premises, although the lessor was not himself the keeper; and he can be prosecuted, tried, convicted, and punished for such offence in the same manner as the actual keeper. *Regina* v. *Roy*, Q. R. 9 Q. B. 312.

3. Extortion—*Accusation — Information.*]—The word "accuses" in s. 405 of the Criminal Code, providing for the punishment of any one who, with intent to extort or gain anything from any person, *accuses* that person or any other person of certain offences, includes the accusing of a person by laying an information under s. 558 of the Code. *Regina* v. *Kempel*, 20 Occ. N. 176, 31 O. R. 631.

4. False pretences — *Fraudulent intent—Demand by third person.*]—O'K., in the presence of the prisoner, made a statement to the complainant as to the amount due by her upon an execution, which was false to the knowledge of both O'K. and the prisoner, and was made with the fraudulent intent on the part of both to induce the complainant to act upon it, and by reason of this statement the complainant paid O'K. in the prisoner's presence a sum of money, part of which O'K. gave to the prisoner.

Held, that the statement was a false pretence within the meaning of s. 358 of the Criminal Code, and that the prisoner was liable to conviction for it, although he did not actually make it himself. *Regina* v. *Cadden*, 20 Occ. N. 185.

5. False return — *Bank Act—Indictment.*]—In an indictment under the Bank Act, 53 V. c. 31, ss. 85 and 99, for making a wilfully false and deceptive statement in a return, it being sufficient in indictments to charge in substance the offence created by the statute, and clerical errors or faulty grammatical construction not vitiating the indictment, the allegation that the defendant unlawfully made and sent to the Minister of Finance and Receiver-General a monthly report of and concerning the affairs of the bank, adding, by way of paraphrase, to characterize the term "monthly report," the words, "a wilful, false, and deceptive statement of and concerning the affairs of the said bank," and finally, that such monthly report was made with intent to deceive and mislead,—sufficiently sets forth the ingredients of the offence; and the indictment was maintained. *Regina* v. *Weir*, Q. R. 8 Q. B. 521.

6. False trade description.]—The defendants by an advertisement in a newspaper described certain tea-sets as "quadruple plate," stating that the

regular price thereof was $12 a set, but that they would be sold for $6. The purchaser of one of the sets, before making his purchase, inquired, and was informed, that it was one of the ten-sets advertised, and that the advertisement could be relied upon.

Held, that the use of the words "quadruple plate" in the advertisement was an application of a false trade description, in that such goods could not properly be described as such; and that there was evidence to shew that the advertisement applied to these goods. *Regina* v. *T. Eaton Co.*, 20 Occ. N. 3, 31 O. R. 276.

7. Incest—*Proof of relationship.*]—On an indictment for incest, proof of the relationship of the accused to his alleged victim must be established according to the rules of the civil law. *Regina* v. *Garneau*, Q. R. 8 Q. B. 447.

8. Malicious injury to property—*Summary conviction — Compensation — Amendment—Costs — Penalty — Appeal.*]—One of the sections of the Act respecting Malicious Injuries to Property enacted that an offender should on summary conviction be liable to a penalty not exceeding $100 over and above the amount of injury done, or to three months' imprisonment.

A conviction thereunder adjudged the defendant "to forfeit and pay the sum of $5 as a penalty, together with $50 for the amount of injury done as compensation in that behalf."

Held, that it was not the intention of the section in question that there should be two separate penalties, but that one penalty should be fixed by first ascertaining the amount of damages, and then adding to that amount such sum not exceeding $100 as the justice should deem proper; and that it was therefore beyond the jurisdiction of the justice to award a sum "as compensation."

Held, also, that the words "as compensation in that behalf" could not be struck out as surplusage under the power of amendment given by s. 80 of the Summary Convictions Act, and the $50 be treated as part of the penalty, inasmuch as the effect of such an amendment would be to punish the offender, not according to the conviction of the magistrate, but according to the conviction as amended by the Court, which was not the intention of that provision. See Criminal Code, s. 883.

The conviction also adjudged the payment of a sum for costs which comprised several items, which exceeded the amounts allowed therefor by the tariff fixed by the Summary Convictions Act as amended by 52 V. c. 45, s. 2, or were not mentioned in the tariff.

Held, that the conviction was therefore bad, and that it could not be amended by striking out the charges improperly made.

The conviction also adjudged, in default of payment, imprisonment for three months.

Held, that s. 68 of the Summary Convictions Act applied, and that, inasmuch as the penalty imposed together with the costs did not exceed $25, two months was the maximum term of imprisonment which could be imposed.

It being contended that the Court had no power on appeal to quash a conviction for defects or errors appearing on the face of the conviction:—

Held, that the Court had such power. *McLennan* v. *McKinnon*, 1 O. R. 219, on this point, not followed. *Regina* v. *Tebo*, 1 Terr. L. R. 196.

9. Possession of counterfeit coin—*Guilty knowledge.*]—It is essential to prove that the coins offered in evidence of guilty knowledge on an accusation of having counterfeit coins in one's possession, are themselves counterfeit. *Regina* v. *Benham*, Q. R. 8 Q. B. 448.

10. Treason—*North-West Territories—Forum for trial—Jury—Dominion statutes—Intra vires—Information—Waiver of objection—Evidence — Stenographer — Appeal—Finding of jury — Insanity.*] — In the North-West Territories a stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, have power to try a prisoner charged with treason. The Dominion Act 43 V. c. 25 is not *ultra vires*.

2. The information in such case (if any information be necessary) may be taken before the stipendiary magistrate alone. An objection to the information would not be waived by pleading to the charge after objection taken.

3. At the trial in such case the evidence may be taken by a shorthand reporter.

4. A finding of "guilty" will not be set aside upon appeal if there be any evidence to support the verdict.

5. To the extent of the powers conferred upon it, the Dominion Parliament exercises not delegated, but plenary powers of legislation.

Insanity as a defence in criminal cases, discussed. *Regina* v. *Riel* (No. 2), 1 Terr. L. R. 23.

11. Trespass — *Damage to property—"Fair and reasonable supposition of right"—Water — Access to shore.*]—The honest belief of a person charged with an offence under R. S. O. c. 120, s. 1 (unlawfully trespassing), or the Criminal Code, s. 511 (wilfully committing damage to property), that he had the right to do the act complained of, is not sufficient to protect him; there must be fair and reasonable ground in fact for that belief.

The usual reservation in a patent of land bounded by navigable water of "free access to the shore for all vessels, boats, and persons" gives a right of access only from the water to the shore, and in this case a person who had broken down fences and had driven across private property to the shore, was held not to be able to successfully assert, when charged under R. S. O. c. 120, s. 1, and the Criminal Code, s. 511, that he "acted under a fair and reasonable supposition of right" in so doing. *Regina* v. *Davy*, 20 Occ. N. 345, 27 A. R. 508.

VIII. Procedure.

1. Appeal to Court of Queen's Bench, Manitoba — *From judgment of stipendiary magistrate, N.-W. T.—Habeas corpus—Presence of prisoner — Production of record.*]—The Court of Queen's Bench for Manitoba has no power to send a *habeas corpus* beyond the limits of Manitoba, and the North-West Territories Acts have not extended its powers in this respect.—The Court will hear an appeal in the absence of the prisoner.—The original papers should be produced, but if the prisoner cannot procure them the Court will act on sworn or certified copies. *Regina* v. *Riel* (No. 1), 1 Terr. L. R. 20.

2. Indictment—*Foundation of charge—Inquest.*]—In the Territories it is not necessary, in order to put an accused person upon his trial on a criminal charge, that the charge should be based upon an indictment by a grand jury or a coroner's inquest. *Regina* v. *Connor*, 1 Terr. L. R. 4.

3. Right to jury—*Stealing cattle.*]—The prisoner was charged with having stolen one steer, and was tried summarily before a Judge without a jury. The Judge found that the value of the animal did not exceed $200. *Held*, that the charge was one of theft simply, although the punishment for stealing cattle was greater than for stealing other property; and s. 66 of the North-West Territories Act applied to the offence, and not s. 67. *Regina* v. *Pachal*, 20 Occ. N. 192.

4. Summoning grand jury—*Irregularities—Sheriff — Disqualification — Coroner.*]—The prisoner was convicted at the circuit for the county of C., which opened on the second Tuesday in November, 1897. When the Court first met, as there was no criminal business, the grand jury was discharged After proceeding for a time with the trial of a civil cause the Court adjourned until the 30th November, before which time the prisoner was committed for trial. The sheriff, without any order, summoned a second grand jury for the adjourned Court. Objection having been taken, on an order made by the Court, the sheriff summoned a third grand jury, which was practically the same as the second. This jury found a true bill, and the prisoner pleaded guilty to two of the counts in the indictment. It then appearing that the sheriff was related to the prosecutor, the Court, without formally discharging the third jury, allowed the plea of guilty to be withdrawn and ordered a fourth grand jury to be summoned, the *venire* being addressed to a coroner. The order for summoning the last grand jury (which also directed the summoning of a petit jury) was brief in form and did not shew on its face all the facts which necessitated its issue. Among the grand jurors summoned by the coroner were two who had been on the sheriff's third panel. The coroner's grand jury was all drawn from the parish of Woodstock.

Held, that the order to the coroner to summon a jury need not shew on its face all the facts that made its issue a necessity.

2. The facts that the sheriff's jury had not been formally discharged, nor the indictment found by it in terms disposed of, were immaterial—the whole proceedings being void by reason of the defect in the returning officer.

3. The power of the Court to summon grand juries is not exhausted by the summoning of two.

4. The disqualification of the sheriff sufficiently appeared.

5. It is not necessary that the grand jury should be drawn from all parts of the county.

6. The fact that some of the jurymen summoned by the coroner were also on the sheriff's panel was not material.

7. It is no objection to the order to the coroner that it directed him to summon both a grand and a petit jury.

8. Section 12 of C. S. N. B. c. 45 applies to criminal as well as to civil matters.

9. *Per* Tuck, C.J.—The doctrine held in England that all the coroners of a county, when acting ministerially, constitute but one officer, is not applicable to this Province.

Per Hanington, J.—The direction of a *venire* to a single coroner, and a return by him alone, is sufficient under s. 12 of C. S. N. B. c. 25, and if not the defect is cured by s. 656 of the Criminal Code. *Regina* v. *McGuire*, 34 N. B. Rep. 430.

See also I., II., IV., V., VI., 1, 3, 4, VII. 1, 3, 5, 8, 10, IX., X.

See VENUE, 1.

IX. SUMMARY CONVICTION.

1. Amendment — *Certiorari — Indian Act.*]—Under s. 889 of the Criminal Code, the Court, if a conviction under any Act to which the procedure in the Code applies is brought up by *certiorari* (whether in aid of a writ of *habeas corpus* or on motion to quash the conviction, is immaterial), may hear and determine the charge as disclosed by the depositions upon the merits, and may confirm, reverse, vary, or modify the decision.

A conviction under the Indian Act, defective on its face, was amended by describing the offence accurately, and by substituting for imprisonment for six months and a fine of $50 and $5 costs or imprisonment for a further term of six months in default of payment of the costs or in default of sufficient distress, imprisonment for six months and a fine of $50 and $5 costs or imprisonment for a further term of three months in default of payment of the fine and costs. *Regina* v. *Murdock*, 20 Occ. N. 350, 27 A. R. 443.

2. Appeal—*Notice to complainant.*]—A notice of appeal from a conviction under the Summary Convictions Act, C. S. C. c. 178, was addressed to the convicting magistrate only, and was served upon him only. The notice contained no intimation that it was served on the magistrate for the prosecutor or complainant, nor did it appear that the magistrate was otherwise notified to that effect.

Held, the notice of appeal was insufficient. *Keohan* v. *Cook*, 1 Terr. L. R. 125.

3. Appeal — *Recognizance.*]—It is too late to file the recognizance required by s. 77 of the Summary Convictions Act, on an appeal from a summary conviction or order where the defendant has not remained in custody, after the appellant has entered upon his case. *Bestwick* v. *Bell*, 1 Terr. L. R. 193.

4. Breach of municipal by-law—*Statement of offence—Costs—Fees of experts.*]—A conviction which purports to be for breaches of a municipal by-law, but fails to set out which of the large number of sections of the by-law the defendant has violated, and does not in other respects allege the offence or offences whereof the defendant was deemed to be guilty, in specific, distinct, and substantive terms, is insufficient and defective, and will be quashed on *certiorari*.—2. The fees paid to experts appointed by the Recorder to visit and report upon the condition of the defendant's premises could not be made payable by the defendant as part of the costs of the conviction. *Riopelle* v. *Desrosiers*, 3 Q. P. R. 195.

5. Costs—*Unauthorized items — Amendment.*]—A justice's order dismissing an information under the Summary Convictions Act, ordered the informant to pay as costs a sum which included items for "rent of hall," "counsel fee," "compensation for wages," and "railway fare."

Held, that none of these items could legally be charged as costs, and that, therefore, the order was bad, so far as it awarded any costs.

Held, also, that the Court could not amend the order by deducting the illegal items; though it could amend by striking out *in toto* all that part of the order relating to costs. *Regina* v. *Dunning*, 14 O. R. 52, considered. *Regina* v. *Laird*, 1 Terr. L. R. 179.

6. Distress — *Imprisonment.*]—A statute provided that in case of non-payment of the penalty and costs immediately after conviction, the justice might, in his discretion, levy the same by distress and sale, or might commit the person who was so convicted and made default, to any common gaol for a term not exceeding six months, with or without hard labour, unless the said penalty and costs should be sooner paid: N. W. T. Act, s. 99.

A conviction under this statute ordered that the penalty and costs be levied by distress, and that, *in default of sufficient distress*, the defendant be imprisoned for one month.

Held, that the imposition of imprisonment in default of distress was authorized by the Summary Convictions Act, R. S. C. c. 178, s. 67. *Regina* v. *Matheweson*, 1 Terr. L. R. 168.

7. Distress—*Imprisonment — Costs of conveying to gaol—Certiorari — Return of amended conviction.*]—The defendant was convicted under a statute which authorized, in default of payment of the penalty and costs, (1) distress, or (2) six months' imprisonment.

The magistrate's minute directed six months' imprisonment, unless the fine and costs should be sooner paid. The magistrate filed with the proper officer a formal conviction, which directed distress, and in default of distress six months' imprisonment. This conviction being obviously bad, inasmuch as (besides not according with the minute) three

months is the limit for imprisonment for default of distress, upon the issue of a *certiorari* the magistrate filed a new formal conviction, which accorded with the minute, except that there were added the words "(unless) the costs of conveying the defendant to the guard room are sooner paid."

Held, following *Regina* v. *Mathewson*, 1 Terr. L. R. 168, that the first formal conviction was bad.

Held, also, that the second formal conviction was also bad, inasmuch as the statute under which the conviction was made did not authorize the imposing of the costs of conveying to gaol; the words to that effect in the forms to the Summary Convictions Act being intended to be used only when expressly made applicable. *Regina* v. *Wright*, 14 O. R. 668, followed.

Semble, *per* Richardson, J., that the Summary Convictions Act, s. 85 (as remodelled by 51 V. c. 45, s. 9), directing that the convicting magistrate shall transmit the conviction to the proper officer "before the time when an appeal * * * may be heard, there to be kept by the proper officer among the records of the Court," and the magistrate having complied with this provision, by filing the first formal conviction, the second could not be considered. *Regina* v. *Hamilton*, 1 Terr. L. R. 172.

8. Wrong name—*Objection.*]—A person whose real name was Bridget Corrigan, but who kept house under the name of Kate Wilson, was arrested under the latter name for an offence under the License Acts, pleaded not guilty, and was tried and convicted under the assumed name, without objecting that it was not her real name. *Held*, that it was too late after conviction to complain of the mistake, and the writ of *habeas corpus* which had been issued was set aside. *Ex p. Corrigan*, Q. R. 9 Q. B. 43.

See COURTS, III.—DAMAGES, 1.

X. SUMMARY TRIAL.

Habeas corpus—*Writ of error—Evidence—Consent—Public morals.*] — A conviction by a magistrate under the sections of the Criminal Code relating to the summary trial of indictable offences may be brought up for review by writs of *habeas corpus* and *certiorari*, a conviction under those sections not being matter of record in such sense as to make it reviewable only by writ of error.

Upon the hearing of a charge under these sections, evidence in other proceedings against another prisoner is admissible upon the consent of the accused's counsel.

Nature of evidence to prove a charge of being an inmate of a house of ill-fame, considered. *Regina* v. *St Clair*, 20 Occ. N. 204, 27 A. R. 308.

See JUSTICE OF THE PEACE, 1, 2.

CROSS-EXAMINATION.

See AFFIDAVIT, 1, 2.

CROSSINGS.

See RAILWAYS AND RAILWAY COMPANIES, IV.

CROWN.

I. EXPROPRIATION OF LAND.
II. NEGLIGENCE.
III. TIMBER LICENSES.
IV. OTHER CASES.

See CONSTITUTIONAL LAW, 9—FERRY, 1—RECEIVER, 1—WAY, I.

I. EXPROPRIATION OF LAND.

1. Canal—*Damage to remaining lands—Access—Undertaking—Right of way—Future damages—Agreement — Increased value.*]—The defendants owned a certain property, a portion of which was taken by the Crown for the purposes of a canal. Access to the remaining portion of the defendants' land was cut off by the canal, but the Crown, under 52 V. c. 38, s. 3, filed an undertaking to build and maintain a suitable road across its property for the use of the defendants. The evidence shewed that the effect of this road would be to do away with all future damage arising from deprivation of access; and the Court assessed damages for past deprivation only.

2. It having been agreed between the parties in this case that the question of damages which might arise in the future from any flooding of the defendants' lands should not be dealt with in the present action, the Court took cognizance of such agreement in pronouncing judgment.

3. In respect to the lands taken, the Court declined to assess compensation based upon the consideration that the lands were of more value to the Crown than they were to the defendants at the time of the taking.

Stebbing v. *Metropolitan Board of Works*, L. R. 6 Q. B. 37, and *Paint* v. *The Queen*, 2 Ex. C. R. 149, 18 S. C. R. 718, followed. *Regina* v. *Harwood*, 20 Occ. N. 424.

2. Railway—*Leasehold interest — Compensation — Measure of damages.*] — The suppliants were lessees of certain land and premises expropriated for the Intercolonial Railway. The premises had been fitted up and were used by them for the purposes of their business as coal merchants. By the terms of the lease under which they were in possession, the term for which they held could at any time be determined by the lessors by giving six months' notice in writing, in which event the suppliants were to be paid $2,500 for the improvements they had made.

Held, that the measure of compensation to be paid to the suppliants was the value, at the time of the expropriation, of their leasehold interest in the lands and premises.

Apart from the sum payable for improvements there was no direct evidence to shew what the value was. But it appeared that the suppliants had procured other premises in which to carry on their business, and that in doing so they had of necessity been at some loss, and that the cost of carrying on their business had been increased.

The amount of the loss and of increased cost of carrying on business during the six months succeeding the expropriation proceedings was, in addition to the sum mentioned, taken to represent the value to them, or to any person in a like position, of their interest in the premises.

The suppliants also contended that, if they had not been disturbed in their possession, they could have increased their business, and so have made additional profits, and they claimed compensation for the loss of such profits, but this claim was not allowed. *Gibbon* v. *The Queen*, 20 Occ. N. 434.

II. Negligence.

1. Government railway—*Negligence of fellow-servant — Common employment — Lord Campbell's Act—Widow and children—Action—Bar—Damages.*] — Article 1056, C. C., embodies the action previously given by a statute of the Province of Canada re-enacting Lord Campbell's Act.

Robinson v. *Canadian Pacific Railway Co.*, [1892] A. C. 481, distinguished.

A workman may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would be an answer to an action under Lord Campbell's Act.

Griffiths v. *Earl Dudley*, 9 Q. B. D. 357, followed.

In s. 50 of the Government Railways Act, R. S. C. c. 38, the words "notice, condition, or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow-servants.

Vogel v. *Grand Trunk R. W. Co.*, 11 S. C. R. 612, disapproved.

An employee of the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the Government contributed annually $6,000. In consequence of such contribution, a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in the discharge of his duty by negligence of a fellow-servant:—

Held, reversing the judgment of the Exchequer Court, 6 Ex. C. R. 276. 19 Occ. N. 202, that the rule of the association was an answer to an action by his widow under Art. 1056, C. C., to recover compensation for his death.

The doctrine of common employment does not prevail in the Province of Quebec. *Grenier* v. *The Queen*, 19 Occ. N. 378, 30 S. C. R. 42.

2. Highway—*Agreement with municipality—Accident from ice—Liability—Public work.*] — Under an agreement between the corporation of a city and the Dominion Government, the latter undertook, amongst other things, to maintain an approach to the Sappers' Bridge, such approach having been built by the city corporation, and forming part of a public highway. On the 23rd February, 1898, the sidewalk on the approach was in a slippery condition, and the suppliant in passing over it fell and sustained a fracture of one of her arms. She filed a petition of right seeking damages against the Crown, under 50 & 51 V. c. 16, s. 16 (*c*).

Held, that, whilst it was the duty of certain servants of the Crown to go and see that the bridge was in a safe condition for pedestrians every morning, the suppliant, upon whom the onus was, had not shewn that they had failed in their duty on the morning of the accident.

2. In this climate it is not possible in winter to have the sidewalks of the highways always in a safe condition to walk upon; and negligence in that respect when it is actionable consists in

allowing them to remain an unreasonable time in an unsafe condition. *Davies* v. *The Queen*, 20 Occ. N. 163, 6 Ex. C. R. 344.

3. Public work—*Bridge—Maintenance—Minister of Public Works.*] — There is nothing in the Public Works Act, R. S. C. c. 36, in relation to the maintenance and repair by the Minister of Public Works of bridges belonging to the Dominion Government, which makes him "an officer or servant of the Crown" for whose negligence the Crown would be liable under s. 16 (*c*) of the Exchequer Court Act, 50 & 51 V. c. 16. *McHugh* v. *The Queen*, 20 Occ. N. 275, 6 Ex. C. R. 374.

4. Public work—*Rifle range—Injury to person.*]—The suppliant was wounded by a bullet fired, during target practice, from the rifle range at Coté St. Luc, in the district of Montreal. He filed a petition of right claiming damages for the injury he thereby sustained.

Held, that the rifle range was not a "public work" within the meaning of clause (*c*) of s. 16 of the Exchequer Court Act, 50 & 51 V. c. 16, and that the Crown was not liable. *Larose* v. *The Queen*, 20 Occ. N. 424.

III. Timber Licenses.

1. Renewal — *Manufacturing condition—Constitutional law — Petition of right—Amendment.*]—The Act 61 V. c. 19 (O.), making applicable to timber licenses the condition approved by order-in-council of the 17th February, 1897, that all pine timber cut under such licenses shall be manufactured into sawn lumber in Canada, is *intra vires*, and applies to licenses issued after the passing of the Act in renewal of licenses in force at the time of its passage.—The rights acquired under sales and licenses of timber limits under the Crown Timber Act, considered.—A petition of right may be amended at the trial.—Judgment in 31 O. R. 202, 19 Occ. N. 391, affirmed. *Smylie* v. *The Queen*, 20 Occ. N. 225, 27 A. R. 172.

2. Statute of Frauds — *Interest in land — Resulting trust.*]—An agreement under which a Crown land lumber license was bid in at public sale at the up-set price by the defendant, in whose name the license was issued, for the plaintiff, who had paid to the defendant the up-set price previous to the sale, does not relate to an interest in land within the Statute of Frauds, and if it does, as the purchase money for the license was paid by the plaintiff, and a trust thereby resulted in his favour by construction of law, it can be established by parol evidence under the Statute of Frauds, C. S. N. B. c. 76, s. 9, *McGregor* v. *Alexander*, 2 N. B. Eq. Reps. 54.

IV. Other Cases.

1. Contract — *Surety—Omissions of officers — Discharge.*] — The defendants were sued as sureties for the performance of a contract to deliver hay to the N. W. M. Police. The defendants contended that they were relieved from liability because the police authorities failed to carry out their part of the contract in material particulars, viz., (1) by using a quantity of the hay before it had been inspected by a board of officers, as provided by the contract; (2) by allowing a portion to be carried off by some of the constables, and another portion to be destroyed by cattle before the hay was weighed or measured, as provided by the coutract; (3) by measuring instead of weighing the hay, as provided by the contract; the result by weighing being much in favour of the defendant's principal.

Held, that the third objection afforded a good defence.

Held, also, that the Crown was responsible for breaches of contract resulting from the acts or omissions of its servants, though not for their torts.

The Queen v. *McFarlane*, 7 S. C. R. 217, and *Windsor and Annapolis R. W. Co.* v. *The Queen*, 11 App. Cas. 607, considered. *Regina* v. *Mowat*, 1 Terr. L. R. 146.

2. Franchise before Confederation—*Liability of Province—Arbitration.*] —A toll-bridge, with its necessary buildings and approaches, was built and maintained by Y. at Chambly in the Province of Quebec, in 1845, under a franchise granted to him by an Act of the Province of Canada, 8 V. c. 90, in 1845, on the condition therein expressed that on the expiration of the term of fifty years the works should vest in the Crown as a free bridge for public use, and that Y. or his representatives should then be compensated by the Crown, provision being therein also made for ascertaining the value of the works by arbitration and award.

Held, affirming the judgment of the Exchequer Court of Canada, 6 Ex. C. R. 103, 18 Occ. N. 228, that the claim on the suppliants for the value of the works at the time they vested in the Crown, on the expiration of the fifty-years franchise, was a liability on the late Province of Canada coming within the operation of s. 111 of the British

North America Act, 1867, and thereby imposed on the Dominion: that there was no lien or right of retention charged upon the property; and that the fact that the liability was not presently payable at the date of the passing of the British North America Act, 1867, was immaterial.

Attorney-General for Canada v. *Attorney-General for Ontario*, [1897] A. C. 199, followed.

Held, also, affirming the decision below, that the arbitration provided for by s. 3 of 8 V. c. 90 did not impose the necessity of obtaining an award as a condition precedent, but merely afforded a remedy for the recovery of the value of the works at a time when the parties interested could not have resorted to the present remedy by petition of right, and that the suppliants' claim for compensation under the provision of 8 V. c. 90 was a proper subject of petition of right within the jurisdiction of the Exchequer Court of Canada. *Yule* v. *The Queen*, 19 Occ. N. 371, 30 S. C. R. 24.

3. Free grant lands—*Indirect alienation—Restraint on—Mistake of title—Statute.*]—Section 19 of the Free Grant and Homesteads Act, R. S. O. c. 29, which provide that "neither the locatee nor any one claiming under him, shall have power to alienate (otherwise than by devise), or to mortgage or pledge any land located as aforesaid, or any right or interest therein before the issue of the patent," does not prevent an agreement being entered into before the issue of a patent for the grant of land after the issue thereof, and, where such agreement was entered into, it was enforced after the issue of the patent, and where all the requisites of s. 8 of the Act had been complied with; Falconbridge, J., dissenting.

Judgment of MacMahon, J., 31 O. R. 54, 19 Occ. N. 318, reversed. *Meek* v. *Parsons*, 20 Occ. N. 173, 31 O. R. 529.

4. Lien—*Dominion Lands Act Amendment, 1897—Seed grain mortgage—Registry laws—Costs—Set-off.*] — F. having made application for a certificate of title for a quarter section of land, notice of the application was served upon the Minister of the Interior, and he caused a caveat to be filed claiming that the Crown was entitled to a lien upon the lands for seed grain advances, for the repayment of which F. had executed to Her Majesty two mortgages on another quarter section. F. became entitled to the patent for the land in 1893, but the issue of it was delayed, because of his liability for the payment of the seed grain advances, until 6th May, 1899, when the patent was issued and was transmitted to the district registrar for registration, together with certificates which complied in their terms with the provisions of the statute.

Held, that the directions of s. 18 of the Act to amend the Dominion Lands Act, 60 & 61 V. c. 29, had not been complied with, and the non-compliance was fatal to the claim of the Crown.

The patent was registered under the old system of registration, and its registration was completed when the district registrar indorsed the certificate of registration upon it: Registry Act, s. 50.

Then in the "abstract book" the quarter section was entered as having been patented by the Crown to F., but no entry or reference was made to the certificates which accompanied the patent.

Immediately after the patent was registered an application was made by F. for a certificate of title under the Real Property Act, and the district registrar thereupon made an entry in a book kept for his own convenience, as examiner of titles, of the receipt of the application and the patent, to which there was attached a certificate of seed grain indebtedness. The book could not be considered to be the "proper register or other record book" spoken of in the statute. The right of interest in the Crown cannot arise until those things which Parliament has prescribed for acquiring it have been performed.

The Crown had failed to shew that it had the lien on the land claimed in the caveat, and the petition should be dismissed with costs against the Crown, to be set off *pro tanto* against F.'s indebtedness. *Regina* v. *Fawcett*, 20 Occ. N. 287.

5. Officers—*Appointment of pilots—Inquiry into—Quo warranto.*]—The pilots for the district of Miramichi having resigned, the defendants were appointed pilots for the district by the Pilotage Commissioners. An injunction was sought to restrain the defendants from acting as pilots under licenses granted to them by the Commissioners, on the grounds (1) that the appointments were not made by by-law confirmed by the Governor-General in council and published in the *Gazette*, as required by the Pilotage Act, R. S. C. c. 80, s. 15; (2) that under that Act the Commissioners fixed by regulation a standard of qualification for a pilot, and that the defendants were not examined as to their competency; (3) that the defendants were not appointed at a regularly called meeting of the Commissioners, or by the Commissioners acting together as a body. A pilot appointed under the Act is appointed during good behaviour for a term not less than two years.

Held, that the office of pilot being a public and substantive independent office, and its source being mediately if not immediately from the Crown, and as the objections related to the validity of the defendants' appointments, and as there was no pretence that the appointments were made colourably and not in good faith, the remedy, if any, was not by injunction, but by information in the nature of a quo warranto. *Attorney-General* v. *Miller*, 19 Occ. N. 409, 2 N. B. Eq. Reps. 28.

6. Petition of right — *Suppliant—Locus standi.*]—The suppliant applied to be allowed to purchase certain lands under s. 31 of the Land Act, tendering the proper amount therefor. The application was refused on the ground that the lands had been granted to a railway company. The suppliant alleged that such grant was illegally issued and void, and the Crown allowed a petition of right to be brought.

Held, dismissing the petition, that the suppliant had no *locus standi* to obtain any relief. *Hall* v. *The Queen*, 7 Brit. Col. L. R. 89.

7. Prerogative — *Attorney-General — Injunction to restrain action—Public harbour.*]—It is a prerogative right of the Crown to stop a suit between subjects in the subject-matter of which it is alleged that the Crown is or may be interested, and in respect of which suit has been brought in behalf of the Crown to have its interest declared.

If the Crown right alleged is a right in behalf of the Province, then the Attorney-General for the Province is the proper officer to exercise the prerogative.

Observations on the history of the Supreme Court of British Columbia. *Attorney-General for British Columbia* v. *Esquimalt and Nanaimo R. W. Co.*, 20 Occ. N. 268, 7 Brit. Col. L. R. 221.

CROWN GRANT.

See MINES AND MINERALS, I.

CURATOR.

Appointment — *Vacant succession — Status of applicant — Family council.*]—No person has an interest entitling him to take proceedings for the appointment of a curator to a vacant succession who is not either a relation or a creditor of the person from whom such succession devolves.—2. The provisions relating to family councils do not apply to the proceedings for the appointment of a curator to a vacant succession, and only relations and creditors are competent to advise the Judge as to the appointment of a curator to a vacant succession. *Ex p. Confederation Life Association*, 3 Q. P. R. 214.

See APPEAL, IX. 8—ASSESSMENT AND TAXES, VI. 2—ATTACHMENT OF DEBTS, I. 5—HUSBAND AND WIFE, 1. 6.

CUSTOMS DUTY.

See REVENUE, I.

DAMAGES.

1. Appeal from conviction — *Dismissal for want of jurisdiction—Action for costs of.*]—The present defendant took an appeal, under the provisions of the Criminal Code, to the Court of Queen's Bench, Crown side, from a conviction by a district magistrate for failing to keep in repair a certain road. This appeal was quashed for want of jurisdiction. Costs were not granted. The present action was brought by the complainant in the previous proceeding, to recover by way of damages the expenses to which the plaintiff had been subjected by the appeal. The Court below awarded $50.

Held (modifying the judgment as to the amount of damages, and granting $200), that the defendants by bringing an appeal in a case in which the Court of Queen's Bench had no jurisdiction, became liable for all legitimate costs and expenses incurred by the present plaintiff in resisting the appeal, including fees of counsel, taxation of witnesses, service of subpœnas, and travelling expenses.

Quære, as to the power of the Court to grant costs where an appeal is quashed for want of jurisdiction. *Beauchesne* v. *Town of Scotstown*, Q. R. 16 S. C. 316.

2. Distribution of—*Negligence causing death—Action by widow—Intervention of parent—Dispute as to right.*]—A wife brought an action for damages resulting from the death of her husband by the negligence of the defendants. The husband's father intervened, alleging that his son did not live with the plaintiff and did not supply her wants, but that he was in the habit of giving the *intervenant* about $400 a year, and that it was the latter who had paid the funeral and other expenses attending the death, and he therefore claimed damages.

Held, that if the plaintiff had not asked as her part of the compensation all the damages resulting from the death of her husband, the *intervenant* could add to such demand by his intervention; also that the *intervenant* had an interest in seeing that the plaintiff did not take all the damages resulting from the death of her husband, if, as a matter of fact, it had caused her no prejudice. The parties mentioned in Art. 1056, C. C., have the same interest against the tort-feasors to make them pay damages resulting from the death; but between themselves they have adverse interests; and it is that adverse interest which justifies the allegation of the *intervenant* that the plaintiff has sustained no prejudice by the death of her husband. The tort-feasor is not to be saddled with the expense of more than one action; the judgment in that action will fix the proportion of the compensation payable to each party. *Morin* v. *Mills*, 3 Q. P. R. 138.

3. Future damages.]—In an action for damages resulting from injuries to the property of another, future damages cannot be claimed, seeing that they are not permanent (at least in the case at bar), and that they are in consequence inappreciable both as to their duration and nature. *Duggan* v. *Stadacona Water Co.*, 2 Q. P. R. 385.

See ARREST, III. 5—CONTRACT, I. 3, 4, 5, 7, 9—COSTS, IX. 4—COURTS, VI. 1—CROWN, I.—DEFAMATION, 1, 5—DISCOVERY, II. 1—DISTRESS—EXECUTION, III. 17 — FERRY, 1 — HUSBAND AND WIFE, I. 7, IV., V. 3—INJUNCTION, I. 2—INSURANCE, VI. 3—JUDGMENT, I. 1, V. 6—LANDLORD AND TENANT, V. 2—LIMITATION OF ACTIONS, 10—MALICIOUS PROCEDURE, 1—MASTER AND SERVANT, IV. 2, 4, V. 2—MUNICIPAL CORPORATIONS, VIII. 1, 4, IX. 2, XI. 2—PARTICULARS, II. 8, 9—PARTNERSHIP, IV. 2—SALE OF GOODS, IV., V., VI. 2—SET-OFF, 1—VENDOR AND PURCHASER, 3—STREET RAILWAYS, II. 1 — VENDOR AND PURCHASER, 11 — WAY, II. 2, V. 1, 3.

DEBENTURES.

See ASSESSMENT AND TAXES, VII. 3—MUNICIPAL CORPORATIONS, VIII. 2.

DECLARATION.

See PLEADING, I.

DECLARATORY JUDGMENT.

See PRINCIPAL AND SURETY, 1—RES JUDICATA, 1.

DEDICATION.

See WAY, II.

DEED.

Construction — *Gravel — Subsequent deposit.*]—In 1856 the owner of land by deed conveyed to a railway company "the gravel situate and being on and comprised within a certain part" of the land, with the right of way for a railway track and the free and unobstructed use thereof, and covenanted for quiet possession, free from incumbrances, of the gravel and other premises conveyed. *Held*, that the gravel deposited on the land since the date of the deed, owing to the action of the waters of a lake, did not pass by the deed. *Mann* v. *Grand Trunk R. W. Co.*, 32 O. R. 240.

See ATTACHMENT OF DEBTS, III. 2—DOWER, 3 — FRAUDULENT CONVEYANCE —HUSBAND AND WIFE, III. 3—MORTGAGE, III. 1—TRUSTS AND TRUSTEES, 5—WILL, II. 1.

DEFAMATION.

1. Evidence—*Previous writings — Provocation—Mitigation of damages—Meaning of words.*] — In libel for two articles which were printed in the defendant's newspaper reflecting upon the character and conduct of the plaintiff:—

Held, that an article in another newspaper, published before the first of the alleged libels, purporting to be an account of an interview with the plaintiff in which he made an attack upon the defendant's newspaper by its name, and a letter signed by the plaintiff, published in two newspapers before the second of the alleged libels, in which the defendant's newspaper and the editor thereof —not the defendant himself—were referred to in abusive language, were admissible in evidence upon the part of the defendant, in mitigation of damages.

Percy v. *Glasco*, 22 C. P. 521, followed.

Held, also, per Rose, J., that editorial articles which appeared on the same day in the newspapers which published the plaintiff's letter, referring to it and to the defendant's newspaper, were admissible too, as furnishing provocation for the second of the alleged libels; Meredith C.J., *contra*.

In the first of the alleged libels one of the statements made about the plaintiff was "that during an election campaign the party managers had to lock him up to keep him from disgracing them on the stump."

Held, that evidence was admissible on the part of the defendant to explain the meaning of the words "lock him up." *Stirton* v. *Gummer*, 20 Occ. N. 5, 31 O. R. 227.

2. Particulars—*Amendment of pleadings.*]—The plaintiff sued the defendant for a libel published in his newspaper. Upon demand of particulars the defendant produced a certain number of issues of his newspaper. At the enquête the defendant made a motion to amend his pleading so as to make it conform to the facts, and at the same time asked leave to produce a number of additional issues of his newspaper to form part of his amended pleading.—*Held*, that such a motion will be dismissed because it would work an injustice upon the defendant, who would be taken by surprise, and because it would alter the pleadings. *Roy* v. *Mercier*, 2 Q. P. R. 495.

3. Pleading—*Defence—Master and servant—Insurance company.*]—An insurance agent, sued for defamation by the insurance company which he formerly represented, may plead, besides the truth of certain facts, that he made other statements than those with which he is charged with making, and made them because the plaintiffs on their part made defamatory statements concerning the company which he now represents, thereby injuring the defendant. *Vallée* v. *Canada Life Assurance Co.*, 3 Q. P. R. 272.

4. Pleading — *Provocation.*]—In an action for slander the defendant may, after admitting, denying, or declaring that he ignores, the allegations of the declaration, allege that he has been provoked by the plaintiff, and that the slander, if any, is compensated, and such allegations will not be dismissed on an exception to the form. *Molleur* v. *Marchand*, 2 Q. P. R. 405.

5. Privilege — *Judicial proceedings — Report of — Statement of advocate — Good faith — Damages.*]—The privilege which protects a report of judicial proceedings made in good faith does not extend to the publication of statements made by an advocate for one of the parties, outside of the Court, and in a private conversation, but these declarations, although they do not constitute a justification, may be pleaded to shew the good faith of the defendant and in mitigation of damages. *Desjardins* v. *Berthiaume*, Q. R. 16 S. C. 506.

6. Privileged occasion — *Malice — Misdirection.*]—In an action for slander, where the occasion was privileged, the trial Judge, in defining malice, which it was essential for the plaintiff to prove, told the jury that it consisted of a reckless statement, of a statement not true, made without consideration of what the probable consequences might be to another person, and of a statement not made in good faith—not truly, but wantonly and recklessly, and without proper consideration.

Held, misdirection, for it should have been left to the jury to say whether the defendant acted through a wrong feeling in his mind against the plaintiff—some unjustifiable intention to do him wilful injury; and a new trial was directed. *English* v. *Lamb*, 20 Occ. N. 377, 32 O. R. 73.

7. Trial—*Nonsuit after verdict—Innuendo—Onus — Evidence for jury — Newspaper—Report—"Blackmailing," meaning of —Truth of words.*]—Where in the trial of an action before a Judge and jury a motion for a nonsuit is made at the close of the plaintiff's case, and again at the close of the whole evidence, and the Judge takes a verdict, and considers the motion after the verdict, he may, in a proper case, nonsuit the plaintiff, notwithstanding a verdict of the jury in his favour. In an action for libel:—

Held, that, there being no evidence, apart from the newspaper article in which they appeared, to shew that the words complained of bore any other than their ordinary meaning, the onus of proof of the innuendo was not satisfied; there was no reasonable evidence to go to the jury that the words conveyed the meaning which the plaintiff attributed to them.

The plaintiff also complained of a statement published by the defendants that a speaker at a public meeting "characterized" the plaintiff's behaviour as "blackmailing." The defendants pleaded the truth of the words used.

Held, that it made no difference that the defendants were only reporting, or purporting to report, the words of another, or whether the report was accurate or inaccurate—that question arises on a defence of fair and accurate report only. If the words were true, the plaintiff could not recover.

The word "blackmailing" should not at the present day and in this country be limited in its meaning to the case of the crime of extortion by threats or any other crime.

There being no evidence of the falsity of the words used, but they appearing, upon uncontroverted evidence, to be true, the plaintiff's case failed.

The respective functions of Judge and jury are, in an action of libel, in no way different from such functions in other actions, except for the statutory provision in favour of a defendant, R. S. O. c. 68, s. 2.

It is the duty of the Court to consider whether there is any reasonable evidence to go to the jury, and, if not, to dismiss the action. *Macdonald* v. *Mail Printing Co.*, 20 Occ. N. 404, 32 O. R. 163.

See COSTS, VI. 4—DISCOVERY, I. 2——HUSBAND AND WIFE, I. 1, 3—JUDGMENT, V. 6 — PARTICULARS, II. 6 — VENUE, 1.

DEMURRAGE.

See SHIP. 3.

DEMURRER.

See ACTION, 5—BILLS OF EXCHANGE AND PROMISSORY NOTES, 3 — DISAVOWAL — FRAUDULENT CONVEYANCE, 2—PARTIES, III. 4—PETITION —PLEADING, V. 6.

DENTIST.

See PROHIBITION, IV. 2.

DEPOSIT.

See BANKS AND BANKING.

DESCRIPTION.

See BILLS OF SALE AND CHATTEL MORTGAGES, 3, 4, 6.

DESERTION.

See DOWER, 1—HUSBAND AND WIFE, III. 1, 3—VIII. 4, 5.

DESISTMENT.

See TRIAL, II. 1.

DETECTION OF CRIME.

See MUNICIPAL CORPORATIONS, I. 2.

DETINUE.

See BILLS OF SALE AND CHATTEL MORTGAGES, 2.

DEVISE.

See WILL.

DEVOLUTION OF ESTATES ACT, ONTARIO.

Payment of debts — *Real and personal property.*]—The Devolution of Estates Act, R. S. O. c. 127, vests the real as well as the personal estate of a deceased person in his personal representatives for the purpose of paying his debts; but, except in the case of a residuary devise of real and personal estate, which is specially provided for by s. 7, the order in which the different classes of property were applicable to the payment of debts before the passing of the Act, has not been disturbed by its provisions. *In re Hopkins Estate*, 20 Occ. N. 446.

See EXECUTORS AND ADMINISTRATORS, 4.

DIES NON JURIDICUS.

See PARTICULARS, I. 7.

DIRECTORS.

See COMPANY, I.

DISAVOWAL.

Direct action for—*Act of disavowal —Necessity for — Affidavit — Costs — Demurrer.*]—An act of disavowal is necessary only where disavowal is sought in a pending action, and a direct action for disavowal will not be dismissed, upon a defence in law, for default of production at the record office of an act of disavowal.—2. In any event, the signature to an affidavit at the foot of the petition for disavowal is equivalent to such an act, in a direct action for disavowal.—3. Evidence before determination in law will be ordered upon a defence in law made in a direct action of disavowal by the plaintiff in the original action, against that part of the claim in the action of disavowal which asks costs against the original plaintiff. *Lewis* v. *Richard*, 2 Q. P. R. 426.

See EXECUTION, III. 4.

DISCIPLINE.

See PROHIBITION, IV. 1.

DISCONTINUANCE.

See ACTION, 1, 2—COSTS, VII. 4, IX. 2—PEREMPTION, 3 — STAY OF PROCEEDINGS, 1.

DISCOVERY.

I. EXAMINATION OF PARTY.
II. INSPECTION.
III. INTERROGATORIES.
IV. PRODUCTION OF DOCUMENTS.

See PARTICULARS.

I. EXAMINATION OF PARTY.

1. Action for account — *Denial of right—Production of books — Prejudice.*]—To an action by an incorporated association of cheesemakers against their president and salesman for an account of all moneys received by him for or on behalf of the plaintiffs for three years past, and the application thereof, and for delivery up of all books and documents in his possession belonging to the plaintiffs, and for an account of profits made by the defendant, one of the defences was that the defendant undertook the sale of the plaintiffs' cheese as a part of his own business, and that it was expressly agreed that he should not be called upon to divulge the names of the persons from whom he received orders, or give any other information touching his business or the account of sales or the bank account in connection with his business, and when examined for discovery he objected to produce his books and documents shewing sales and prices realized and persons to whom sales made, because, as he alleged, that would in effect give the plaintiffs what they sought in the action before they had established their right to it, which was expressly contested.

Held, that, as the fiduciary relationship existing between the parties was practically admitted, the position of the plaintiffs in seeking accounts and inquiries was not exactly like that of a plaintiff whose right depended on his establishing a case for them at the hearing. The defendant set up an extraordinary agreement, the probability of establishing which was not very great, and this was an element in determining the matter in the exercise of a sound discretion. The plaintiffs were, therefore, entitled to the discovery. *Sydney Cheese and Butter Factory Association* v. *Brower*, 20 Occ. N. 208, 19 P. R. 152.

2. Defamation — *Justification — Immorality — Disclosure of name of paramour.*]—The defendants having in their newspaper charged the plaintiff with immorality, the plaintiff sued them for libel, and the defendants pleaded that the charge was true. The plaintiff having required particulars, the defendants set forth that the plaintiff lived at a house of ill-fame; that he lived at a particular place in adultery; that a child was born to the woman with whom he lived; and that he brought to his house and kept with the members of his family a woman who had lived in a house of ill-fame. The plaintiff, being examined for discovery, admitted that he had lived in adultery with a woman who had previously lived in a house of ill-fame, and that she bore a child of which he was not the father, but denied the other allegations of the particulars.

Held, that the plaintiff was bound to disclose the name of the woman, although such disclosure might injure her. *Macdonald* v. *Sheppard Publishing Co.*, 20 Occ. N. 454, 19 P. R. 282.

3. Preliminary hearing.]—A plaintiff whose title is denied by an *exception à la forme* cannot refuse to be examined for discovery as to this defect of title before the hearing of the exception. *Morcau* v. *Lamarche*, 3 Q. P. R. 73.

4. Scope of examination.]—In the examination of a party or his representative for discovery under Arts. 286 *et seq.*, C. C. P., the witness can be asked as to every fact relating to the claim or to the defence; and in this case the question asked was relevant to the claim. *Canadian Pacific R. W. Co.* v. *Richelieu and Ontario Navigation Co.*, Q. R. 9 Q. B. 293.

5. Scope of examination — *Cross-examination—Rule 703 — Retroactivity.*]—Upon the examination for discovery of the defendants certain questions were objected to, on the ground that they were in the nature of cross-examination. The examination was adjourned for the purpose of bringing the matter before a Judge in Chambers, and on the 30th May, 1900, Martin, J., made an order requiring the defendants to answer the questions objected to. The defendants appealed to the full Court.

Owing to some doubt as to the construction to be placed on the Rules providing for examinations for discovery.

on the 15th June, 1900, Rule 703 was amended so as expressly to sanction cross-examination.

Held, dismissing the appeal, that the examination for discovery under Rule 703 (even before the amendment) was in the nature of a cross-examination, but limited to the issues raised in the pleadings. *Carroll* v. *Golden Cache Mines Co.*, 6 Brit. Col. L. R. 354, overruled.

The amendment of 15th June, 1900, is retroactive. *Bank of British Columbia* v. *Trapp*, 20 Occ. N. 464.

II. INSPECTION.

1. Pleading — *Damages.*]—Action to recover the price of a hat destroyed by an icicle which fell from the roof of the defendant's house. The plaintiff went to the defendant's house to claim the value of the hat; she asked to see it and said she would pay after seeing it. Later the plaintiff wrote to her that he would not go to her house. Then the defendant sent an expert to see the hat, but the plaintiff refused to let him see it. The defendant asked that she might not be obliged to plead until she had seen the hat and ascertained the damages. An order was made to that effect. *Derny* v. *Marceau*, Q. R. 16 S. C. 226.

2. Premises — *Photographs.*]—By virtue of Art. 289, C. P., a Judge may permit one of the parties to go upon the premises of the other for the purpose of photographing the place where the accident in question in the action happened. *Primeau* v. *Merchants Cotton Co.*, 3 Q. P. R. 175.

3. Premises—*View.*]—Except in cases where a view of the *locus* is prescribed under the terms of Art. 392, C. C. P., a Judge cannot order a plaintiff claiming damages for injury to his property to submit to have his residence and property examined with the defendant with a view of ascertaining whether he can be held liable for the damages claimed. *Gareau* v. *Montreal Street R. W. Co.*, Q. R. 8 Q. B. 409.

See TRIAL, VII.

III. INTERROGATORIES.

1. Knowledge, information, and belief—*Documents.*] — An answer to an interrogatory must be in plain and positive language, and clear in meaning, so that it may be safely put in evidence.

It is not sufficient for the plaintiff, in answer to an interrogatory, to deny having any knowledge, without stating his information and belief.

Where a plaintiff was properly interrogated as to the existence of a document in a public office, it was held that he was not bound to seek knowledge as to the fact, but that, if he had such knowledge or information or belief upon the subject, he should answer fully as to his knowledge, information, and belief. *Scott* v. *Sproul*, 2 N. B. Eq. Reps. 81.

2. Service with writ ex juris—*Ex parte order—Incorporation of English practice.*]—The Judicature Ordinance, R. O. 1888 c. 58, s. 479, enacts: "When no other provision is made by this Ordinance, the procedure and practice existing the Judicature Ordinance, R. O. 1888 shall (adapted to the circumstances of the Territories), be held to be incorporated as part of this Ordinance."

English Order 31 is intituled "Discovery and Inspection." Rules 1-11 of that Order deal with discovery by interrogatories, and do not appear in the Judicature Ordinance. The remaining Rules 12-13, with some slight modifications, do appear therein under the same title: ss. 144 *et seq.*

Held, that the practice and procedure laid down in English O. 31, rr. 1-11, were incorporated in the Judicature Ordinance by s. 479. Section 185 of the Judicature Ordinance, R. O. 1888, c. 58, is intended only for the purpose of perpetuating testimony or obtaining evidence to be used at the trial, and not for the purposes of discovery. *Contra* per Richardson, J.

Concurrently with an order for service *ex juris*, an order was made *ex parte* giving the plaintiffs leave to deliver interrogatories with the writ of summons.

Held, that, as the material in support of the order did not profess to shew grounds as provided by Jud. Ord. s. 402, to satisfy the Judge that "delay caused by proceeding in the ordinary way" (*i.e.*, on notice) "would or might entail irreparable or serious mischief," the order ought not to have been made *ex parte*. *Young* v. *Brassey*, 1 Ch. D. 277, discussed. *Lougheed* v. *Praed*, 1 Terr. L. R. 253.

IV. PRODUCTION OF DOCUMENTS.

1. Affidavit of documents — *Sufficiency of description—Privilege.*]—An affidavit of documents which described certain bank books as bill registers, current accounts, and ledgers for stated periods:—

Held, sufficient.

Privilege was claimed for the first time in respect of such books in a supplementary affidavit filed subsequently to the issue of a summons for a further and better affidavit.

Held, that this affidavit defeated the summons, and that the claim of privilege must be allowed. *Bank of British Columbia* v. *Oppenheimer*, 20 Occ. N. 142, 7 Brit. Col. L. R. 104.

2. Pleading—*Documents mentioned in—Affidavit.*] — Application to enforce production of documents to which reference had been made in the defendants' pleading: Order XXX., Rules 15, 17, 18.

The defendants had referred to a certain deed which contained a reservation, both in the grant and habendum, as follows: "Subject, however, to the terms of a written agreement entered into between the said parties this day." The defendants objected to produce this agreement, upon the ground that it was not a document referred to in the pleadings. The plaintiff's affidavit did not allege that the document was in the possession or power of the defendants. For the plaintiff it was contended that, if the document was to be regarded as one referred to in the pleadings, no affidavit was necessary: Order XXX., Rule 18.

Held, that the agreement was not a document referred to in the pleadings; that the affidavit was defective; and the motion should be refused with costs. *Robert* v. *Miller* (No. 2), 20 Occ. N. 410.

3. Privilege — *Photographs.*]—Photographs sworn to be part of the materials of the defendants' evidence in the action are privileged from production.

Documents sworn to be called into existence in the *bona fide* belief that litigation might ensue are not for this reason only privileged from production. *Feigenbaum* v. *Jackson*, 7 Brit. Col. L. R. 171.

See I. 1.

See EVIDENCE, VI. 1—JUDGMENT, III. —6—MANDAMUS, 1.

DISCRETION.

See ADMINSTRATION, 2 — COSTS, I. — COURTS, V. 2 — EVIDENCE, V. 1 — INFANT, III. 2 — JUSTICE OF THE PEACE, 4—LANDLORD AND TENANT, III.—MUNICIPAL CORPORATIONS, II. 2—PROHIBITION, 1. 2—REVENUE, I. —SCHOOLS, 1, 4—TRIAL, II. 1.

DISMISSAL OF ACTION.

See ACTION, 1, 3, 4—APPEAL, VII.—COSTS, VII., 5, 6 — LUNATIC, 1 — MINES AND MINERALS, II. 5—PARTICULARS, I. 1—TRIAL, II. 1, IV., VI. 2—WRIT OF SUMMONS, III. 4.

DISTRESS.

Water rates — *Sale after payment — Damages.*] — The defendants having caused the plaintiff's goods to be seized for water rates, he, on the day of the seizure, paid the amount of the account. Nevertheless, by reason of an error in the entry of payment in the books of the defendants, the bailiff, finding no record of the payment, gave notice of sale and went on with the sale on the day fixed. The plaintiff did not leave his receipt at his house for the bailiff to see; but the latter discovered the error and offered to have the goods sold returned to the plaintiff; the plaintiff, however, refused to make any arrangement, saying that the defendants would have to take the consequences of the error.—*Held*, that, in these circumstances, the plaintiff had no right to damages against the defendants, but could recover only the value of the goods sold. *Clermont* v. *City of Montreal*, Q. R. 16 S. C. 331.

See ASSESSMENT AND TAXES, II. — CANADA TEMPERANCE ACT, 2 — COMPANY, II. 6, IV. 2—CRIMINAL LAW, IX. 6, 7—LANDLORD AND TENANT, II., IV. 1, 2—MUNICIPAL CORPORATIONS, XV. 1 —SESSIONS.

DISTRIBUTION.

See EXECUTORS AND ADMINSTRATORS, 2.

DISTRICT COURTS.

See COURTS, IV.

DISTRICT MAGISTRATE.

See PROHIBITION, III. 1.

DITCHES AND WATERCOURSES ACT.

See WATER AND WATERCOURSES, I.

DIVISION COURTS.

See COURTS, V.

DIVISIONAL COURTS.

See APPEAL, VI., XIII. 4.

DIVORCE.

See HUSBAND AND WIFE—JUDGMENT, II. 3.

DOCUMENTS.

See DISCOVERY, III. 1, IV.—EVIDENCE, II.—JUDGMENT, III. 6.

DOMICIL.

Change of—*Jurisdiction—Pleading.*]—Want of jurisdiction *ratione personæ* cannot be set up unless it has been pleaded by *exception declinatoire.*—2. One who is proved to have had his domicil in the Province is regarded as having continued it there, even when he has gone to reside elsewhere, if it has not been proved that he has acquired a domicil at his new place of abode. *Pilnik* v. *Numizinski*, Q. R. 16 S. C. 231.

See ASSESSMENT AND TAXES, V. 2—ATTACHMENT OF DEBTS, II. 11—COURTS, VII. 2—JUDGMENT, II. 3—MARRIAGE, 1.

DOMINION LANDS.

See CONSTITUTIONAL LAW, 7—CROWN, IV. 4.

DOMINION LANDS ACT.

See REGISTRY LAWS, III. 3.

DONATIO MORTIS CAUSA.

See GIFT, 2, 3—HUSBAND AND WIFE, VI.

DOWER.

1. Desertion by wife — *Registration.*]—The defendant had sued the plaintiff, her husband, *en séparation de corps*, and her action had been dismissed. Instead of returning to live with him, she abandoned the original home, and, several years afterwards, registered a claim for dower against the lands of her husband. In an action to cancel the registration:—*Held*, that it was illegal, because the advantages which she was entitled to by reason of her marriage with the plaintiff were dependent upon the condition of fulfilment of the obligations incumbent upon her as his wife. And the Court adjudged the defendant to return to the conjugal domicil within thirty days, and, in default of her doing so, the Court declared that the defendant should be deprived of her matrimonial rights and advantages, and that the registration of the claim to dower should be cancelled by the plaintiff registering the judgment now pronounced. *Gibson* v. *Patrick*, Q. R. 16 S. C. 504.

2. Estate in fee—*Undivided share—Commencement of right — Costs.*]—The plaintiff brought suit for dower, arrears of dower for six years before action, and costs of suit.

The defendant denied the right, asserting that:

1. The deceased had only an estate for life, and not in fee.

2. If the plaintiff was dowable, she was only entitled to dower in an undivided one-half of the premises.

3. She was only entitled to dower from the commencement of the suit, as the deceased did not die seized.

4. She was not entitled to costs of suit.

The first ground was decided in the plaintiff's favour: 1 N. B. Eq. Reps. 53.

Held, that the defendant was entitled to succeed on the second and third grounds; and no costs were allowed. *Ahern* v. *Ahern*, 20 Occ. N. 19.

3. Separation deed—*Jointure—Election.*]—On the 24th July, 1868, the plaintiff and her husband and trustees on her behalf executed a deed which, after reciting that disputes had arisen between the husband and wife and that an action for alimony was pending, provided for the separation of the husband and wife and the conveyance of certain property by the husband to trustees for the benefit of the wife, and contained a number of covenants, one of which was a covenant by the trustees that the wife would, whenever called upon, release her dower in any lands of which the husband might thereafter acquire a title. The husband died in January, 1898, having acquired and dying seised of other lands. In August, 1898, the wife brought this action claiming dower in these lands, having up to that time continued to have the beneficial use and possession of the lands mentioned in the deed of 1868.—*Held*, that

that deed provided a jointure for the wife, within s. 7 of 27 Hen. VIII. c. 10; that the acceptance of the deed and the benefits thereby conferred was an election by her within that Act to accept the jointure; and, therefore, she was not entitled to dower in the after-acquired lands.—Judgment in 19 Occ. N. 244, 30 O. R. 689, affirmed. *Eves* v. *Booth*, 20 Occ. N. 346, 27 A. R. 420.

See WILL, II, 2.

DRAINAGE.

See MUNICIPAL CORPORATIONS, VIII.

DRUNKARD.

See INTOXICATING LIQUORS.

DUTY.

See REVENUE.

EASEMENT.

1. Pleading—*Interest of claimant.*]—In an action to establish a right of servitude, allegations in the defence that the plaintiff has no interest in the servitude which she claims—in this case a right of way—and that her action is brought only for the purpose of forcing the defendant to purchase her land, will be struck out on demurrer. *Content* v. *Demers*, 2 Q. P. R. 500.

2. Right of way — *Limited grant — Colourable user.*]—A right of way granted as an easement incidental to a specified property cannot be used by the grantee for the same purposes in respect to any other property. Judgment of the Court of Appeal, 26 A. R. 95, *ante* 77, affirmed. *Robinson* v. *Purdom*, 19 Occ. N. 374, 30 S. C. R. 64.

3. Sale of land—*Severance—User.*]—*Held*, affirming the judgment in 32 N. S. Reps. 340, that where two properties of one owner are sold at the same time, and each of the purchasers has notice of the sale to the other, the right to any continuous easement passes with the sale as an absolute legal right; but the same must have been enjoyed by the vendor at the time of the sale. Therefore, one purchaser could not claim the right to use a dam on his land in such a way as to cause the water to flow back on the other property, where such right, if it had ever been enjoyed by the former owner, had been abandoned years before the sale. *Hart* v. *McMullen*, 20 Occ. N. 197, 30 S. C. R. 245.

See WATER AND WATERCOURSES, II. 1.

ECCLESIASTICAL LAW.

See CHURCH—MARRIAGE, 2.

EJECTMENT.

See JUDGMENT, IV. 2, 3 — LANDLORD AND TENANT, VIII. 2—LIMITATION OF ACTIONS, 12—STAY OF PROCEEDINGS, 2.

ELECTION.

See DOWER, 3 — LANDLORD AND TENANT, IV. 1—VENUE, 4—WILL, II.

ELECTIONS.

See MUNICIPAL ELECTIONS — PARLIAMENTARY ELECTIONS.

EMPHYTEUSIS.

See LANDLORD AND TENANT, IX. 2.

EMPLOYERS' LIABILITY ACT. B. C.

See MASTER AND SERVANT, V.

EMPLOYERS' LIABILITY INSURANCE.

See INSURANCE, II.

ENCLAVE.

See WAY, VIII. 1.

ENGINEER.

See WATER AND WATERCOURSES, I. 1.

ENTAIL.

See ESTATE.

ENTIRETIES.

See HUSBAND AND WIFE, X.

ENTRY FOR TRIAL.

See TRIAL, II.

EQUITABLE ASSIGNMENT.

See CHOSE IN ACTION, 5.

EQUITABLE CHARGE.

See MERGER.

EQUITABLE EXECUTION.

See ATTACHMENT OF DEBTS, I. 9, II. 6 — FRAUDULENT CONVEYANCE, 6 — RECEIVER.

ESTATE.

Estate tail—*Bar of entail—Mortgage—Will—Construction.*]—By a will made in 1847 a testator, who died in 1854, devised to his son a piece of land, describing it, and proceeded: "All which shall be and is hereby entailed on my said son and his heirs for ever." In 1859 and again in 1860 the son granted the land in question in fee by way of mortgage, each mortgage being duly registered within a few days of its execution and each containing the usual proviso that it was to be void on payment at a named date. No discharge of either mortgage or reconveyance of the mortgaged land had been registered, and there was no evidence whether either mortgage had in fact been paid.

Held, *per* Osler and Moss, JJ.A., that under this will the son did not take an estate tail; Maclennan and Lister, JJ.A., contra.

But *held*, also, *per Curiam*, that, even if the son did take an estate tail, that estate tail had been barred and converted into an estate in fee simple in his own favour as well as in that of the mortgagee by the execution and registration of the mortgages.

Lawlor v. *Lawlor*, 10 S. C. R. 194, and *Plomley* v. *Felton*, 14 App. Cas. 61, applied. *Culbertson* v. *McCullough*, 20 Occ. N. 349, 27 A. R. 459.

See DOWER, 2—EXECUTORS AND ADMINISTRATORS, 4 — INTOXICATING LIQUORS—SETTLEMENT—WILL, I. 4, 7.

ESTOPPEL.

See APPEAL, XVI. 1—ASSESSMENT AND TAXES, VI. 1 — ATTACHMENT OF DEBTS, III. 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, 14—BILLS OF SALE AND CHATTEL MORTGAGES, 2—FIXTURES—INFANT, I. 3—LANDLORD AND TENANT, VII.—PARTNERSHIP, IV. 4—PRINCIPAL AND AGENT, 2 — WATER AND WATERCOURSES, II. 1, II. 1.

EVICTION.

See VENDOR AND PURCHASER, 11.

EVIDENCE.

I. ADMISSION OR REJECTION.
II. BOOKS AND DOCUMENTS.
III. CORROBORATION.
IV. CREDIBILITY OF WITNESSES.
V. FOREIGN COMMISSION.
VI. MOTION—EVIDENCE ON.
VII. NEW EVIDENCE AFTER HEARING.
VIII. PAROL EVIDENCE.

See BROKERS — COMPANY, VI. 2—CONTRACT, IV. 3—COSTS, IV. 2—CRIMINAL LAW, I., II. 1, III. 2, V., VI. 2, VII. 10, X.—DEFAMATION, 1—DISCOVERY—EXECUTORS AND ADMINISTRATORS, 4—EXTRADITION—GIFT, 4—JUDGMENT, III. 5—LANDLORD AND TENANT, III., VII., XI. LIMITATION OF ACTIONS, 11—LIQUOR LICENSE ACT, I., V. 2, 3—MARRIAGE, 2—MASTER AND SERVANT, III. 2, IV. 1, 7 — MEDICAL PRACTITIONER, 2—MINES AND MINERALS, I. 7, 8—NEGLIGENCE, 2—PARTICULARS—PAYMENT OF MONEY OUT OF COURT—PRINCIPAL AND AGENT, 4—SHIP, 5—STREET RAILWAYS, II. 1—SUNDAY, 1—TRIAL, III.

I. ADMISSION OR REJECTION.

1. Negligence — *Fire — Sparks from steamer.*]—In an action to recover the value of buildings destroyed by fire started, as was alleged, by sparks escaping from the defective smokestack of a

steamboat, evidence that on prior and subsequent days sparks of large size escaped from this smokestack may be admissible to prove its defective construction; but opinionative evidence that, having regard to the force and direction of the wind on the day in question, sparks of this size if they escaped might have been carried to the building in question is too conjectural and speculative. *Peacock* v. *Cooper*, 20 Occ. N. 201, 27 A. R. 128.

2. Negligence — *Safeguards — Subsequent placing.*]—Where an injury is alleged to have been caused by the negligence of the defendant in not furnishing proper safeguards at some place of danger, evidence of safeguards placed there by him after the injury is not admissible for the purpose of shewing his prior negligence; and upon an examination for discovery the defendant is justified in declining under advice to answer questions relating to such subsequent placing. *Cole* v. *Canadian Pacific R. W. Co.*, 20 Occ. N. 103, 19 P. R. 104.

II. Books and Documents.

1. Exhibit—*Copy of document—Acquiescence.*]—Where the defendant has not objected to a copy of writing *sous seing-privé* set out in the plaintiff's declaration being produced in lieu of the original, which the plaintiff asserts is in the possession of a third party, he cannot ask that *ex parte* proceedings since the return be rejected on the ground that the defendant has contravened Arts. 155, 157, C. P. *Latour* v. *Brazier*, 3 Q. P. R. 174.

(See *post*, VII. 2.)

2. Goods sold — *Books of vendor.*]—By a notice printed on the pass-book containing entries of the goods sold by the plaintiffs to the defendant, the pass-book was not to be conclusive as to the amount of the purchaser's indebtedness, and it further appeared that the book contained errors and discrepancies. — *Held*, that, in view of the notice on the pass-book and the fact that the book contained errors, the plaintiffs were not precluded from making proof, by the books of the company, of the actual amount of the defendant's indebtedness. *Montreal Brewing Co.* v. *Jones*, Q. R. 16 S. C. 422.

3. Mortgage — *Alteration — Presumption—Proof of execution—Registry Act.*]—The production of the registered duplicate original of an instrument with the registrar's certificate indorsed thereon is, by virtue of s. 63 of the Registry Act, R. S. O. c. 136, *prima facie* evidence of the due execution thereof, notwithstanding the fact that material alterations appear on the face of the instrument, all questions as to these alterations being however still left open.

Whenever it would be an offence to alter an instrument which has been completed, the legal presumption is that material alterations appearing on the face of the instrument were made at such a time and under such circumstances as not to constitute an offence. *Greustock* v. *Barnhart*, 19 Occ. N. 381, 26 A. R. 545.

III. Corroboration.

Interested party.]—In an action by or against the representatives of a deceased person, the corroborative evidence required by R. S. O. c. 73, s. 10, may be found in the other facts adduced in the case, raising a natural and reasonable inference in support of the evidence whereof corroboration is required.

Semble, also, that corroborative evidence within the meaning of that section may be given by an interested party, so long as he is not the party obtaining the decision. *In re Curry — Curry* v. *Curry*, 20 Occ. N. 383, 32 O. R. 150.

See Husband and Wife, I. 8.

IV. Credibility of Witnesses.

Expert opinions.]—Where there is direct contradiction between equally credible witnesses, the evidence of those who speak from facts within their personal knowledge should be preferred to that of experts giving opinions based upon extra-judicial statements and municipal reports. *Crawford* v. *City of Montreal*, 30 S. C. R. 406.

V. Foreign Commission.

1. Discretion—*Appeal.*] — The granting of a commission to take evidence is in the discretion of the Judge to whom the application is made, but where strong reasons are shewn to the Court why the commission should not have been granted, such as failure to exercise due diligence on the part of the party applying, or unreasonable delay caused to the opposite party, the discretion will be reviewed.

In a case which had been twice tried, and was coming on for a third trial, where it appeared that two commissions

had already been obtained, and evidence taken under each; that the facts sought to be established had been previously known to, or their existence suspected by, the party applying; where it was not alleged that the evidence sought to be obtained was material and necessary, and that the party could not safely proceed to trial without it, but only that the examination would be effectual; and where no defence based upon the fact sought to be established had been set up, and no application had been made to amend the pleadings so as to enable it to be set up:—*Held*, that the order for the commission must be set aside with costs. *McLeod* v. *Insurance Companies*, 32 N. S. Reps. 481.

2. Order for — *Lapse — Extension of time.*]—An order allowing the issue of a commission rogatory returnable within a time fixed lapses at the expiration of that time, if the commission has not been issued, and consequently the Court cannot extend the time for the return. *Giraud* v. *City of Montreal*, 3 Q. P. R. 160.

See STREET RAILWAYS, II. 1.

VI. MOTION—EVIDENCE ON.

1. Cross-examination on affidavit —*Attachment of debts—Salary of municipal officer—By-law—Production.*] — An order having been made attaching all debts due to a judgment debtor by a city corporation, the paying teller of the corporation made an affidavit that nothing was due from the corporation to the debtor at the time of service of the attaching order. Cross-examined, he said that the debtor was assessment commissioner for the corporation and in receipt of a salary, but that advances had been made to him on account of it, by the authority of the treasurer of the city, so that nothing was due.

Held, that the affiant should be compelled to answer all questions put to him on cross-examination on his affidavit bearing on the advances made in the past to the debtor, and those bearing on the affiant's authority to make them, and his motives in doing so if he were exercising a discretion.

Held, also, Street, J., dissenting, that the affiant should answer the question whether he had ever made advances on account of salary to any other employee of the city, and, if he should answer it in the affirmative, he might be further interrogated as to the number of such instances, but he was not to be compelled to disclose the names of persons to whom such advances had been made.

Held, also, that the affiant was not compellable to produce any of the city by-laws, not being the custodian thereof. *Wilson* v. *Fleming*, 20 Occ. N. 377, 19 P. R. 203.

2. Security for costs—*Nominal plaintiff—Insolvency.*]—The plaintiff, being examined by the defendant as a witness upon a motion made by the defendant to set aside the proceedings and dismiss the action or for security for costs, on the ground that the plaintiff had no interest in the company on behalf of whose shareholders as well as himself he was suing, was asked what means he had of satisfying the costs in the action.

Held, that the defendant could not interrogate the plaintiff as to his financial position until, at least, a *prima facie* case had been made out that he was only the nominal, and not the real and substantial, plaintiff; and the evidence given upon the motion before the examination of the plaintiff shewed that he had a substantial interest. *Pritchard* v. *Pattison*, 20 Occ. N. 309, 19 P. R. 180.

(See the next case.)

3. Security for costs—*Nominal plaintiff—Insolvency—Affidavit — Notice of motion.*]—The decision of ROSE, J., 20 Occ. N. 309, 19 P. R. 180, affirmed on appeal; STREET, J., dissenting.

Held, *per* Boyd, C., that an application for security for costs on the ground that the plaintiff is insolvent and is only nominally interested in the action, should be based on an affidavit of belief on the defendant's part that such are the facts, and such an affidavit should at least be furnished by the defendant before he attempts to establish the facts by examining the plaintiff.

Semble, that the proper practice in such a case is to have the grounds set forth in the notice of motion, as was done in *Port Rowan and Lake Shore R. W. Co.* v. *South Norfolk R. W. Co.*, 13 P. R. 327; and if this method were adopted, an affidavit of belief might be dispensed with if it was proposed to establish the facts alleged out of the mouth of the plaintiff.

Held, *per* Falconbridge, C.J., that the finding of ROSE, J., that the plaintiff had a substantial interest, should be adopted, and such being the position, the defendant had no right to prove the plaintiff's poverty out of his own mouth on this application.

Per Street, J., dissenting, that the defendant was entitled to examine the plaintiff for the purpose of shewing that he was a mere nominal plaintiff suing for the benefit of another, as well as for the purpose of shewing his insolvency; and the defendant could not be required to establish each particular proposition involved in his motion, in its

logical order, before proceeding with the next.

Leave was given to the defendant to proceed in proper form with his application for security. *Pritchard* v. *Pattison*, 20 Occ. N. 435, 19 P. R. 277.

VII. New Evidence after Hearing.

1. Exchequer Court—*Patent for invention—Experiments after trial.*]—An application was made, after the hearing and argument of the cause but before judgment, for leave to the defendants to file as part of the record certain affidavits to support the defendants' case by additional evidence in respect of a matter upon which evidence had been given by both sides. It was open to the defendants to have moved for leave for such purpose before the hearing was closed, but no leave was asked. It also appeared that the affidavits had been based upon some experiments which had not been made on behalf of the defendants until after the hearing.

Held, that the application must be refused.

Humphrey v. *The Queen*, 2 Ex. C. R. 286, and *DeKuyper* v. *VanDulken*, 3 Ex. C. R. 88, distinguished. *General Engineering Co. of Ontario* v. *Dominion Cotton Mills Co.*, 20 Occ. N. 52, 6 Ex. C. R. 306.

2. Leave to adduce, after judgment in appeal—*Amendment of record.*]—After the judgment of the Court of Appeal affirming the judgment of the trial Judge dismissing the action, had been pronounced, drawn up, and entered, and while an appeal was pending therefrom to the Supreme Court of Canada, the plaintiffs moved for leave to adduce further evidence for the purpose of shewing that an exhibit which was used as part of the evidence in the case was not a true copy of the original document. It was not suggested that there was any error in the judgment of the Court of Appeal which could be corrected by the introduction of the proposed evidence, or that, if the proposed evidence had been given while the appeal was pending, the judgment would have been different. It might tend to displace one of the grounds on which the trial Judge relied, or might prevent the defendants from relying upon that ground if the case went further, but that was all that could be said:—*Held*, that the application should be refused. Rule 498, which empowers the Court to receive further evidence, is clearly confined to cases where such evidence is sought to be introduced for the purpose of the appeal. *Dueber Watch Case M'f'g. Co.* v. *Taggart*, 20 Occ. N. 374, 19 P. R. 233.

3. Revision of sentence—*New witnesses.*]—Upon a demand for revision of a sentence of interdiction pronounced by the prothonotary, the Court can hear other witnesses than those who were examined before the prothonotary. *Bond* v. *Barry*, Q. R. 16 S. C. 365.

VIII. Parol Evidence.

Conveyance — *Cutting down to mortgage.*]—The plaintiff executed a transfer absolute in form of land to the defendants. The plaintiff alleged that the transfer was executed to secure the defendants against their liability as indorsers of a promissory note for him; that he made default in payment at maturity; and that eventually the whole amount had been paid, partly by the plaintiff, and partly by the proceeds of the sale of a portion of the property transferred; and claimed an account and re-conveyance. The defendants alleged that the transfer was intended to operate according to its terms, *i.e.*, as an absolute conveyance. The trial Judge found the facts in favour of the plaintiff upon evidence which, beyond the transfer and the notes, was wholly parol.

Held, that the plaintiff was entitled to judgment declaring the transfer though absolute in form to be a mere security, and directing an account and the reconveyance of the residue of the property. *Blunt* v. *Marsh*, 1 Terr. L. R. 126.

See Contract, IV. 2—Sale of Goods. VIII. 2, IX. 1, 3.

EXAMINATION IN ACTION.

See Discovery, I., III. — Judgment Debtor.

EXAMINATION OF INSOLVENT.

See Statutes, V. 1.

EXCEPTION.

See Action, 4—Affidavit, 3—Appeal X. 5 — Bankruptcy and Insolvency, II. — Benefice d'Inventaire — Company, III. 1 — Costs VII. 5, 6, 9, 14—Courts, VI. 5—Discovery, I. 3—Execution, III. 3—19 — Executors and Administrators, 8—Husband and Wife, VIII. 1—Infant, II. 3—Jurisdiction, I. 2—Municipal Elections, I. 4, 11—Parties, III. 4 — Partition—Pleading, III.—Solicitor, I.—Stay of Proceedings, 3—Writ of Summons, III. 1.

EXCHANGE OF LANDS.

See VENDOR AND PURCHASER, 5.

EXCHEQUER COURT OF CANADA.

See EVIDENCE, VII. 1—RAILWAYS AND RAILWAY COMPANIES, XI. 2—REVENUE, I. 1.

EXECUTION.

I. EXEMPTIONS.

II. SEIZURE—ABANDONMENT.

III. SEIZURE—OPPOSITION TO.

IV. SALE UNDER.

V. TIME FOR ISSUING.

See COSTS, IX. 11—HUSBAND AND WIFE, VIII. 6 — INJUNCTION, II. 3—RECEIVER — REGISTRY LAWS, III. 3—SHERIFF, 1—VENDOR AND PURCHASER, 2.

I. EXEMPTIONS.

1. Notice of sale—*New proceedings.*]—Where goods of the plaintiff were seized under execution, and she filed an *opposition* alleging that the notices of sale and the advertisements of the seizure were irregular, and that certain of the goods seized were exempt, the execution creditors were granted an order declaring the opposition maintained, and allowing him to proceed to sell the goods seized other than those claimed as exempt, upon giving new and regular notices of sale. *Jean* v. *De Marchi*, 2 Q. P. R. 442.

2. Property of Indians on Reserve—*Resistance—Contempt of Court.*]—By virtue of the Indian Act, 46 V. c. 43 (D.), and its amendments, the property and effects of Indians upon their Reserve are exempt from seizure under execution. The word "property," used alone in a statutory provision, includes both movables and immovables without distinction. A rule *nisi* to commit for contempt the defendant, an Indian, who resisted the seizure of his goods, without committing an assault upon the bailiff, was quashed. *Brussières* v. *Bastien*, Q. R. 17 S. C. 189.

See BANKRUPTCY AND INSOLVENCY, I. 6.

II. SEIZURE—ABANDONMENT.

Sheriff — *Notice — Custodia legis—Security.*]—Goods were seized under execution by the sheriff, who left them in possession of the judgment debtor's wife, who claimed to be the owner, upon her agreeing to hold them for him. Some months later the sheriff, under the same writ, took the goods, which were then in the possession of the claimants, who claimed to have bought from one H., who claimed to have bought from the wife after the original seizure. *Held*, in view of the Administration of Civil Justice Ordinance, 1884, s. 83, that there was no abandonment by the sheriff; that he was right in resuming actual possession; and that, therefore, the execution prevailed over the claimants' title. *Brittlebank* v. *Gray-Jones*, 1 Terr. L. R. 75.

III. SEIZURE—OPPOSITION TO.

1. Contestation—*Notice of—Time.*]—It is not until after the return of the original opposition, that the notice of contestation prescribed by Art. 650, C. P., can be given. *Gravel* v. *Tétrault*, 3 Q. P. R. 176.

2. Contestation — *Notice of—Time—Original opposition.*]—It is not until after the production of the original of the *opposition* that the *opposant* can give notice of contesting; and an inscription for judgment *ex parte*, effected within the usual time after the production of a copy of the *opposition*, but less than twelve days after that of the original, will be struck out on motion. *Lindman* v. *Paradis*, 2 Q. P. R. 477.

3. Customer's goods — *Opposition by depositary.*] — The defendant, a tanner, had in his possession a large number of skins which he had received from customers to be tanned. These were seized under a writ of *fi. fa.* goods issued against the defendant.—*Held*, that the defendant was entitled to maintain an *opposition à fin d'annuler*; the seizure being void because the tanner held the skins *à titre de dépositaire*. *Latouche* v. *Leclerc*, Q. R. 17 S. C. 181.

4. Disavowal—*Diligence.*] — One who disavows after judgment, and does not proceed with diligence to have his disavowal declared valid, cannot oppose the execution of the judgment, and the *opposition*, in these circumstances, will be dismissed on motion. *Sylvestre* v. *Struthers*, 3 Q. P. R. 146.

5. Exception—*Time for filing — Affidavit—Commissioner—Claim of exemption —Guardian to seizure — Solvency.*] — A plaintiff who wishes to make an exception to the form of an opposition made to a seizure has, under Art. 650, C. P., 12 days from the service of the notice required by this Article within which to file such exception.—An opposition to a

seizure will not be set aside as irregular because the commissioner who took the affidavit signed it "L. P. Dupré, C. C. S. D. for the district of Montreal." —An opposition made by the defendant, based upon paragraphs 1 and 8 of Art. 598, C. P., which does not allege that the bailiff making the seizure has not left the defendant firing and food sufficient for himself and family for three months, and that he has not left hay and other fodder necessary for animals which by paragraph 8 of such Article are declared not to be seizable, but which alleges only that these goods are of the class which ought to be left to the defendant, at his option, in virtue of such paragraph, will be set aside, under Art. 651, C. P., as being made with the object of unjustly delaying the sale, provided that the person making the opposition does not allege damages.—The fact that the bailiff seizing has not stated in his report that he has required the defendant to furnish a solvent surety before naming a guardian, is not a reason for nullifying the seizure, if the defendant does not complain that the bailiff has refused to accept a solvent guardian. *Lachance* v. *Lachance*, 3 Q. P. R. 282.

6. Goods in possession of third person — *Will—Insaisissibilité — Alimentary debt.*]—When a third party declares that he has in his possession goods belonging to the judgment debtor, and an order made upon this declaration has directed the sale of these goods, pursuant to Art. 695, C. P. C., it is not necessary that a writ of execution should issued to authorize their seizure and sale. —In spite of the fact that the donor or testator has stipulated that articles given or bequeathed shall not be seized upon any account whatever, such articles may be seized for an alimentary debt. *Préfontaine* v. *Valois*, Q. R. 16 S. C. 613.

7. Guardian — *Duties of—Delivery of goods — Discharge — Mistake — Costs.*]—A voluntary guardian, upon an attachment of goods claimed pending litigation of claim, is in the wrong if he does not notify the execution creditor that the goods intrusted to him are upon the point of being sold at the instance of another creditor; and his omission to do so may expose him to an action for damages, but not to arrest.—2. The service upon the guardian of a copy of a judgment declaring the plaintiff the owner of goods which have been seized is not sufficient to put the defendants and the guardian in default for not delivering the goods; it is necessary, in addition, to send to the defendant's abode an officer authorized to take delivery of the goods. —3. The guardian is in law discharged after one year reckoned from his nomination, the ordinance of 1667 (tit. 19, Art. 22) being still in force in this country.—4. If the guardian makes a mistake, and the applicant for the rule has proceeded irregularly upon that, the rule will be dismissed without costs. *Hochelaga Bank* v. *McConnell*, 2 Q. P. R. 470.

8. Guardian — *Non-appointment of —Debtor left in possession.*]—An opposition to a seizure made by the execution debtor upon the ground of the non-appointment of a guardian to the effects seized will be dismissed on motion where it appears that the defendant himself was left in possession of the effects seized. *Globensky* v. *Sanguinet*, 2 Q. P. R. 493, Q. R. 16 S. C. 503.

9. Guardian—*Volunteer.*] — The voluntary guardian in respect of a seizure of goods has no status to oppose the seizure and sale of these goods in another cause in which he has not been appointed guardian. *Joly* v. *Younie*, 3 Q. P. R. 190.

10. Inoperative assignment — *Sale of lands.*]—*Held*, affirming the decision in Q. R. 13 S. C. 125, that an assignment of effects, incomplete in that it does not contain a sworn list of creditors and that it has not been followed by the requisite notices, cannot be set up by way of opposition to a seizure of the property of the debtor.—2. The modes of execution which the Code of Procedure (old text) prescribes as to realty included in an assignment of property do not exclude the ordinary remedy which a creditor has by virtue of his judgment of proceeding by writ against lands to the seizure and sale of the real estate of his debtor. *St. Jorre* v. *Morin*, 10 L. N. 14, approved. *Birks* v. *Lewis*, Q. R. 8 Q. B. 517.

11. Irregularity—*Residence — Waiver —Appeal—Delay—Motion to dismiss opposition.*]—A defendant cannot set up, as a ground for setting aside a seizure, an erroneous description of his domicil, if it is described in the writ of execution and the *procès-verbal* as it is in the writ of summons, and he has not objected to the irregularity during the time allowed for delivering an *exception à la forme* (Art. 176, C. P.).—2. The setting down of an appeal from a judgment after the time allowed therefor cannot delay the execution of such judgment.—3. An opposition based upon these facts will be dismissed on motion. *Atkinson* v. *Ryan*, 3 Q. P. R. 94.

12. Irregularity—*Status of claimant to attack.*] — The claimant of goods seized cannot attack the seizure for irregularity. *Germain* v. *Lamoureux*, Q. R. 16 S. C. 404.

13. Joint seizure—*Grounds of opposition—Frivolity.*] — The Court will dismiss as frivolous, on motion, an opposition *à fin d'annuler* made by joint defendants on the following grounds:—1. That a *requête civile* is pending to annul the judgment, no order to suspend proceedings having been given by the Judge.—2. That the seizure is made upon defendants jointly without stating which owned the effects seized, the seizure being made in the joint domicil of the defendants.—3. That the notices of sale are irregular, no detail of such irregularity being given. *Nash* v. *Honan*, 2 Q. P. R. 452.

14. Landlord's privilege—*Sale and lease.*]—When goods are under seizure, the execution debtor cannot, by selling these goods, with the land on which they are, to a third person, and by taking from this third person a lease of such land and the goods seized, confer upon the third person a landlord's privilege capable of being set up as against the execution creditor, upon distribution of the moneys arising from the sale of these goods, made at the suit of another creditor. *Dagenais* v. *Honan*, Q. R. 17 S. C. 478.

15. Motion to dismiss opposition—*Grounds.*] — A plaintiff cannot, by a motion made under the provisions of Art. 651, C. P., demand the dismissal of an opposition because it is made after the delivery of a former opposition which has been dismissed, and at a time when all the notices following upon the seizure have been given, and without the authorization of a Judge, and because it does not invoke grounds subsequent to the proceedings which have caused the suspension of the sale in the first place; such grounds having only the force of an *exception a là forme* to the opposition; and Art. 651 applying only when it appears by the opposition itself, or by the proceedings on the record, that it is made with the object of unjustly delaying the sale. *Le Comptoir d'Escompte* v. *Gaudet*, 3 Q. P. R. 97.

16. Prior seizure.] — An opposition for the purpose of setting aside a seizure under execution is well-founded in law if, among other grounds, it invokes a prior seizure under execution of the same goods, even if it is not alleged that the sheriff is proceeding under the prior seizure. *Samson* v. *Beauregard*, 3 Q. P. R. 256.

17. Repeated seizures — *Damages—Bailiff — Execution creditor.*] — A bailiff holding a writ of execution against a debtor, instead of at first seizing all the chattels which were to be found at the house of the debtor, seized only a part, and, upon the debtor and his wife filing an opposition, returned a second and a third time and seized goods which he might have included in the first seizure. *Held*, that he was liable to the debtor for the damages and annoyance which these repeated seizures had caused.—2. It was the duty of the bailiff, under the circumstances, after the first seizure, to abstain from proceeding upon the writ of execution until after judgment upon the opposition.—3. The party for whom the bailiff acted, in spite of the fact that he was not aware of these repeated seizures, was liable jointly with the bailiff and severally for the damages suffered by the debtor, where by defending the action he had adopted the acts of the bailiff. *Bédard* v. *Bachand*, Q. R. 16 S. C. 348.

18. Separate claim for costs.]—If the opposition to an execution which has been issued at the request of the attorney separately, and of the party whom he represents, is ill founded with respect to the attorney, he can demand the dismissal as to him. *Laramée* v. *Hubert*, 3 Q. P. R. 167.

19. Stay — *Motion to dismiss—Exception.*]—An *opposition* to a seizure under execution will not be dismissed upon motion because no order for a stay has been made by a Judge; the sheriff having suspended proceedings and made a return to that effect, the *opposition* is regularly before the Court for adjudication.—2. Such a motion, not attacking the merits of the opposition, is in the nature of an *exception à la forme*, and cannot be entertained except in so far as it attacks the opposition as futile and is based upon prejudice caused by the irregularities complained of. *Ville de St. Jean* v. *Lefebvre*, 3 Q. P. R. 23.

20. Stay — *Second opposition—Former one dismissed—Reservation.*] — Where an *opposition à fin de charge* was dismissed, by a judgment which reserved to the *opposant* the right to take the proper proceedings to protect his interests, no order to stay the proceedings upon the execution pending a new *opposition* will be granted to the *opposant* now setting up a different claim base upon reasons existing before the former *opposition* was made. *Thompson* v. *Caldwell*, 2 Q. P. R. 428.

21. Substitution — *Interest of institute.*]—1. The property held under a substitution, which has not been declared to be exempt from seizure, can be seized for the debts of the institute. The interest of the institute in a substituted property can be seized, but the sale does not affect the rights of the substitutes unless the sale has been made for

a claim either prior or preferable to the substitution itself. *Desjardins* v. *Michaud*, Q. R. 8 Q. B. 494.

22. Title—*Necessity to allege.*] — An opposition which merely sets forth that the opposant is proprietor of the effects seized, without mentioning any title thereto, is futile, and will be dismissed on motion. *Desroches* v. *Drapeau*, 3 Q. P. R. 230.

23. Writ of possession—*Opposition—Stay of proceedings.*]—An opposition to a writ of possession which alleges that, since the judgment rendered against the defendant, he has obtained from one of the attorneys of the plaintiff leave to occupy for a certain time the room let by the plaintiff, and which is accompanied by an order for a stay made by a Judge of the Superior Court, will not be dismissed on motion. *Hart* v. *Dubreuil*, 3 Q. P. R. 291.

See COSTS, IX. 8.

IV. SALE UNDER.

1. Re-sale—*Liability of bidder—Garnishee — Contempt of Court.*] — When a judicial adjudication of movables is not followed by immediate payment of the price of adjudication, the bailiff may immediately resell the said movables.—2. But this does not release the bidder from his liability. The moment a person bids at a judicial sale, he incurs liability for the amount of his bid, and is bound to make the same good if the subsequent sale does not realize an equal amount.—3. In this case the garnishee, having after the sale paid the amount of the adjudication to him of the books seized both by him and the plaintiff, was discharged of his obligations as garnishee.—4. He was not subject to coercive imprisonent for contempt in not delivering the books to be sold again at the suit of the plaintiff, who had also seized them. *Ducheene* v. *Collins*, Q. R. 16 S. C. 277.

2. Sale of land by sheriff—*Effect of—Extinguishment of rights.*] — In the Province of Quebec a sheriff's sale, accompanied by legal formalities, gives a complete and absolute title to the purchaser of the property sold, and extinguishes all the rights charged upon such property, with the exception of a lien resulting from the commutation of seigniorial rents, of a lease for a term of years, of substitutions not open, and of customary dower not open. The decree extinguishes all the other rights: Art. 711, C. P. C. (old code). *King* v. *Nadeau*, Q. R. 17 S. C. 342.

See III. 10.

V. TIME FOR ISSUING.

Judgment—*Appeal.*] — When a judgment is inscribed in review and confirmed by the Court of Review, the judgment of the latter Court takes the place of the original judgment, and the delay for execution runs from the reception by the prothonotary of the judgment of the Court of Review. Even assuming that this were not so, the delay for execution in any event ceases to run from the date of the deposit and inscription in review, and only recommences to run from the date of the judgment rendered by the Court of Review. *O'Dell* v. *Bell*, Q. R. 17 S. C. 373.

EXECUTION CREDITORS.

See MORTGAGE, IV. 1.

EXECUTORS AND ADMINISTRATORS.

1. Action against executor—*Stay of proceedings—Inventory.*] — An action against executors to recover the amount of a promissory note made by the testator was stayed until the time allowed to the executors *pour faire inventaire et délibérer* should have expired. *Bank of Montreal* v. *Killoran*, 3 Q. P. R. 204.

2. Distribution of estate — *Unpaid legatee—Contribution by others—Limitation of actions.*]—Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an administration action instituted by other residuary legatees in which they have not been added as parties, and of which they have receivel no notice The judgment in such an action, however, enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations.—In the absence of reasonable efforts by the executors of an estate to discover the whereabouts of persons entitled to share in the residue, other persons who have received a share of the residue must refund, for the benefit of the persons whose claims have been ignored, the amount received in excess of the sum payable if the division had been properly made. *Uffner* v. *Lewis—Boys' Home of Hamilton* v. *Lewis*, 20 Occ. N. 296, 27 A. R. 242.

3. Fatal Accident Act — *Death of beneficiary—Survival of action.*]—An action under the Fatal Accident Act, R. S. O. 1897 c. 166, by the personal representative of the deceased for the benefit of a beneficiary, survives on the death of the latter, and may be continued on

representation being obtained to the estate of the beneficiary. *McHugh* v. *Grand Trunk R. W. Co.*, 20 Occ. N. 437, 32 O. R. 234.

4. Judgment against executors—*Evidence of debt — Indorsement of note—Devolution of Estates Act — Caution—Estate.*]—A judgment against executors is only *prima facie* evidence of its being for a debt due by the testator, and the parties interested in the real estate are at liberty to disprove it. In an action by a judgment creditor on a judgment recovered on a promissory note discounted by him, which note was received by the executors for the sale of personal property of the testator, and indorsed "without recourse" to the plaintiff:—*Held*, that the indorsement of the note by the executors would not make it a debt of the testator in the hands of the indorsee. *Held*, also, that the effect of the Devolution of Estates Act and amendments, acted upon by the registration of a caution under the sanction of a County Court Judge, after the twelve months had expired, was to place lands of a testator again under the power of his executors so that they could sell them to satisfy debts; and that the expression "in the hands" of executors, as applied to property of the testator, is satisfied if it is under their control or saleable at their instance; and that the operation of a devise of lands is only postponed for the purposes of administration, and the estate does not pass through the medium of the executors, but by the operation of the devise. *Janson* v. *Clyde*, 20 Occ. N. 116, 31 O. R. 579.

5. Mortgage—*Purchaser of equity—Indemnity—Death—Release — Insolvent estate —Administrator.*]—The administrators of the insolvent estate of a deceased mortgagor are not liable in damages to his mortgagee as upon a devastavit, because they release the purchaser of the equity of redemption in the mortgaged property from his liability to indemnify the mortgagor in respect of the mortgage.—Judgment in 30 O. R. 684, 19 Occ. N. 280, affirmed. *Higgins* v. *Trusts Corporation of Ontario*, 20 Occ. N. 347, 27 A. R. 432.

6. Negligence—*Agent's fraud — Limitation of actions—Trustee Limitation Act.*] —The Trustee Limitation Act, R. S. O. c. 129, s. 32, protects executors where, relying in good faith on the statement of their testator's solicitor that he has in his hands securities sufficient to answer a fund they are directed by the will to invest for an annuitant, they distribute the estate, and it is afterwards found that before the testator's death the solicitor had misappropriated the money given to him by the testator to invest, and had in fact at the time of the representation no securities or money in his hands. Payments made from time to time by the solicitor to the annuitant, ostensibly as of interest received by him from the fund, do not keep alive the right of action against the executors. Judgment of STREET, J., 30 O. R. 532, 19 Occ. N. 174, reversed. *Clark* v. *Bellamy*, 20 Occ. N. 350, 27 A. R. 435.

7. Notice to claimants—*Limitation of actions—Trustee Limitation Act—Trustee Relief Act.*]—A notice by executors that "all parties indebted to the estate of the late (testator) are required to settle their indebtedness" by a named date, and that "parties having claims against said estate are also required to file same by said date," is not a sufficient notice within s. 38 of R. S. O. c. 129 to protect the executors from liability for claims not brought to their knowledge until after the estate has been distributed by them. Their liability in this respect extends to claims against their testator for money lost owing to a breach of duty by him as trustee. Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good money lost owing to his negligence, and the Trustee Limitation Act does not run against them from the time of the loss, but only from the time their reversionary interest becomes an interest in possession. After judgment had been given in the Court below (30 O. R. 110, 18 Occ. N. 407), against the executors in this case, the Act for the Relief of Trustees, 62 V. c. 15 (O.), was passed—*Held*, that, assuming the Act to apply to such a case, it did not relieve the executors, for they could not be held to have acted reasonably when they failed to follow the plain statutory directions as to notice to creditors and claimants. *Stewart* v. *Snyder*, 20 Occ. N. 351, 27 A. R. 423.

8. Registration — *Power of appointment—Exception.*]—If the will does not provide for the replacing of executors, a person who has been named as executor, in place of one who has resigned, is not qualified to act as such, and an intervention made by the co-executors will, upon exception to the form, be dismissed as regards the executor thus irregularly named in place of another. *Lavoignat* v. *Mackay*, 2 Q. P. R. 493.

9. Transfer of debt to executors—*Pleading—Reply—Departure.*] — Executors have a status to recover a balance due upon a debt transferred to them in their capacity of executors.—If, in reply to an exception to the form, they set up

and produce documents which confer upon them more extended powers than those which are given to them by the law alone, such part of the reply will not be struck out on motion, as setting up a new ground of action. *Francis* v. *Rhine*, 3 Q. P. R. 320.

10. Trespass to land — *Survival of action—Continuing cause of action — Revivor.*]—In an action for trespass to land, brought in 1895, the statement of claim included a claim for erecting and maintaining fences and depasturing cattle. The plaintiff died in July, 1897, and his executrix was made a party in April, 1898. *Held*, that R. S. N. S. c. 113, s. 21, in relation to the maintenance of actions of trespass by executors and administrators, applied. It appearing also that trespasses had been going on since the action was brought, and that a fence thrown down as a trespass had been rebuilt and continued:—*Held*, that the claim was for a continuing cause of action within the meaning of O. 34, R. 46. *Grant* v. *Wolfe*, 32 N. S. Reps. 444.

See AMENDMENT — ATTACHMENT OF DEBTS, II. 7—COSTS, IV. 7 — COURTS, VII. 2—DEVOLUTION OF ESTATES ACT, ONTARIO — FRAUDULENT CONVEYANCE, 2—HUSBAND AND WIFE, I. 8—LIMITATION OF ACTIONS, 11—MORTGAGE, II. 4—PARTIES, I.—PLEADING, V. 4—SUCCESSION—TRUSTS AND TRUSTEES—WILL, I. 9, III. 1.

EXEMPTIONS.

See ASSESSMENT AND TAXES, III., VI. 1 — BANKRUPTCY AND INSOLVENCY, I. 5—EXECUTION, I., III. 5—FRAUDULENT CONVEYANCE, 5—LANDLORD AND TENANT, II. 2, 3, 4, IV. 2—REGISTRY LAWS, III. 3.

EXPROPRIATION OF LAND.

See CROWN, I.—MORTGAGE, I. 2—MUNICIPAL CORPORATIONS, IX. — RAILWAYS AND RAILWAY COMPANIES, V., XI. 1—WAY, II. 2.

EXTINGUISHMENT.

See PEREMPTION.

EXTORTION.

See CRIMINAL LAW, VII. 3.

EXTRADITION.

Prisoner discharged on habeas corpus—*Bar to second trial—Evidence—Crime.*]—1. The question whether a proceeding subsequent to an adjudication on *habeas corpus* is barred by such adjudication, is to be determined by the identity or non-identity of the question before the Court or magistrate with the question adjudicated upon on *habeas corpus*. A prisoner who has been liberated upon the merits of the charge laid against him, when the conviction or order of detention founded on the charge is set aside as unfounded in law, cannot be lawfully arrested and imprisoned again for the same offence, upon the same state of facts; but when he is discharged merely by reason of a defect in the commitment or in consequence of the want or excess of jurisdiction in the committing Court or magistrate, he can be again arrested and tried for the same cause before a competent Court or magistrate. 2. A prisoner who has been discharged upon *habeas corpus*, because the extradition commissioner had no jurisdiction to act judicially on the complaint laid before him, may be again arrested and tried before a commissioner having jurisdiction over the complaint. For an extradition commissioner to decline to exercise his jurisdiction, the fraudulent device by which the prisoner was brought within the jurisdiction must be chargeable to the adverse party. 3. Documents authenticated by the seal of the Grand Ducal Superior Court of Baden, and also by the signature of the Judge of Instruction of such Court, are legal evidence. 4. Where a crime for which extradition can be demanded has been established by evidence and experts as existing under the law of the country demanding extradition, and the extradition commissioner is aware from his own knowledge that the same facts establish an extradition crime in this country, although it bears a different name, the commitment is valid. *Ex p. Seitz*, Q. R. 8 Q. B. 392.

FACTORIES ACT.

See MASTER AND SERVANT, II.

FACTORY.

See MUNICIPAL CORPORATIONS, II. 1.

FALSE PRETENCES.

See CRIMINAL LAW, VII. 4.

FALSE RETURN.

See CRIMINAL LAW, VII. 5.

FALSE TRADE DESCRIPTION.

See CRIMINAL LAW, VII. 6.

FAMILY COUNCIL.

See CURATOR — INFANT, II. 1 — WILL, III. 3.

FARM CROSSINGS.

See RAILWAYS AND RAILWAY COMPANIES, IV.

FENCES.

Division wall—*Cost—Contribution.*] — *Held*, affirming the judgment in Q. R. 14 S. C. 140, that one who in building upon his own land erects a wall which separates his land from his neighbour's cannot afterwards recover from his neighbour one-half the cost of the wall. *Bernard* v. *Pauzé*, Q. R. 16 S. C. 406.

See FIXTURES—RAILWAYS AND RAILWAY COMPANIES, VI.

FERRY.

1. Breach of grant — *Subsequent lease — Damages — Crown.*]—The Crown, having granted to the suppliant certain ferry rights over a river between two cities, subsequently leased certain property to two railway companies to be used for the construction of a bridge across the river between the cities, and also gave permission or license to a railway company to extend its track over certain property belonging to the Dominion Government on one side of the river, to enable the company to make closer connection with an electric company:—*Held*, that the granting of the leases and license did not constitute a breach of any contract arising out of the grant of the ferry; and that the Crown was not liable to the suppliant in damages in respect of the matters complained of in his petition. *Semble*, that, if the leases and licenses prejudiced the rights acquired by the suppliant under his ferry grant, he would be entitled to a writ of *scire facias* to repeal them. *Brigham* v. *The Queen*, 20 Occ. N. 423.

2. Public carrier—*Negligence of private carrier.*]—The defendant was the proprietor of a small ferry across the Ottawa river. He was engaged in other occupations, and the boat made no regular trips; but whenever anyone came asking that he and his property should be taken across, the defendant and his employees left their other work, rowed them across, and charged for doing so. The plaintiff and his companion were being rowed across, and had two horses aboard, which they themselves had embarked, acting under instructions given by the defendant. In the middle of the stream the boat veered suddenly, one of the horses became frightened, and (there being no railings or other protection) jumped into the water and was drowned:—*Held*, that the defendant was not a common carrier:—*Held*, further, that the defendant being under no obligation to provide a safer boat, and the plaintiff electing to take the risk and to remain in charge of his own animals while crossing, the defendant was not liable for negligence as a private carrier. *Nugent* v. *Smith*, 45 L. J. Ex. 707, *Blower* v. *Great Western R. W. Co.*, L. R. 7 C. P. 655, and *Kendall* v. *London and South Western R. W. Co.*, L. R. 7 Ex. 373, followed. *Roussel* v. *Aumais*, 20 Occ. N. 445.

See BILLS OF SALE AND CHATTEL MORTGAGES, 2.

FINES.

See CANADA TEMPERANCE ACT, 2 — VOLUNTARY ASSOCIATION.

FIRE.

1. Prairie fire ordinance—*Railway engine—Escape of fire — Conviction.*]—An ordinance of the Territories prohibited the kindling and placing of fire "in the open air in any part of the Territories," except for certain purposes. The defendants, who were respectively fireman and engine driver of a freight train, were severally convicted of a breach of the ordinance upon evidence to the effect that sparks from the fire which they had kindled in the locomotive engine had kindled a fire on the adjacent prairie, there being, as the magistrate found, no evidence of improper construction of the engine, or of negligence on the part of the defendants:—*Held*, that these facts afforded no evidence of the defendants kindling a fire "in the open air." *Regina* v. *Clive*. *Regina* v. *Holdsworth*, 1 Terr. L. R. 170.

2. Setting out — *Municipal by-law — Notice—Negligence — Onus — Contributory negligence.*]—A person who sets out fire upon his own land in a township without giving the notice to the owner or occupant of the adjoining property required by a township by-law, passed pursuant to R. S. O. c. 223, s. 542, s.-s. 16, and imposing a penalty upon any person contravening the by-law, pursuant to s. 702, s.-s. 1 (*b*), is not, by reason of the omission of such notice, liable for damage done to the adjoining property, without proof of negligence; but the failure to give notice is *prima facie* evidence of negligence, and puts the onus upon the defendant of the proof of no negligence:—*Held*, upon the evidence in this case, that the defendant had satisfied that onus as regards the property of the plaintiff first destroyed, the cause of which was the sudden rising of a high wind, which the defendant was not bound to anticipate, and which caused the smouldering fire to suddenly blaze up. As to the property of the plaintiff subsequently destroyed, there was negligence on the part of the defendant, for he might have taken measures to control the fire after the destruction of the first property; but there was contributory negligence on the part of the plaintiff in not making any effort to remove his property from danger; and he could not, therefore, recover. *Tait* v. *Jackson*, 20 Occ. N. 234.

See EVIDENCE, I. 1 — MASTER AND SERVANT. IV. 2—RAILWAYS AND RAILWAY COMPANIES, VII.

FIRE INSURANCE.

See INSURANCE, III.

FISHING.

See SHIP, 4.

FIXTURES.

Field stones—*Lumber—Roof of "lean-to"—Fence rails—Machinery — Annexation of, to freehold — Detachable part.*]—*Held*, without deciding whether field stones which lie imbedded in or upon the surface of the soil are part of the soil, that their character is at all events changed when they are taken from the place where they are found and piled up in another place. The stones, by the act of severance ceased to be a natural deposit and became chattels; and the supposed intention of the deceased to use them for building purposes did not again change their character. *Lewis* v. *Gordon*, 15 O. R. 252, specially referred to. *Tucker* v. *Linger*, 21 Ch. D. 18, distinguished:—*Held*, upon the evidence, that, although lumber had at one time formed part of the roof of a "lean-to," it had been taken apart by the intestate before his death and divided up into boards, and so had become chattels:—*Held*, that, although a fence is part of the realty, and although it might be that material placed along the line of a contemplated fence, but not used because the fence is not completed, also belongs to the freehold, yet the rails in question here did not become fixtures, because, so far as the evidence shewed, there was an entire absence of contemplation to erect them into a fence, and they were, therefore, chattels which the defendant had the right to sell. A hay-fork was part of a plant consisting of a track, a truck, pulleys, a rope, and the fork. The track was fastened with bolts or screws to the barn roof. Without the track, the truck would be useless; in fact, each of the articles was a joint in the whole, and the whole would be useless without its parts, or without any one of them:—*Held*, following *Gooderham* v. *Denholm*, 18 U. C. R. 214, that the hay-fork in question was a fixture, and the circumstance that it could be used again in connection with another track, truck, pulleys, and rope, of similar kind and dimensions, did not deprive it of its character. *McCarthy* v. *McCarthy*, 20 Occ. N. 211.

See MORTGAGE, IV. 2.

FORECLOSURE.

See MORTGAGE, II.

FOREIGN COMMISSION.

See EVIDENCE, V.

FOREIGN COMPANY.

See COMPANY, II. 2—COSTS, IV. 8, 9.

FOREIGN COURT.

See ATTACHMENT OF DEBTS I. 4—WILL, III. 1.

FOREIGN JUDGMENT.

See JUDGMENT, II.

FOREIGN LANDS.

See SPECIFIC PERFORMANCE, 1.

FOREIGN LAW.

See INSURANCE, VI. 4—MARRIAGE, 1.

FOREIGN PATENT.

See PATENT FOR INVENTION, 3.

FOREIGNER.

See WRIT OF SUMMONS, V. 4.

FORFEITURE.

See COMPANY, III. 1—CONTRACT, III. 5—INSURANCE, V. 2, 6. VI. 5—LANDLORD AND TENANT, IV. 1.

FORGERY.

See CRIMINAL LAW, II.

FRANCHISE.

See CROWN, IV. 2.

FRAUD.

See ATTACHMENT OF DEBTS, II. 6—BANKRUPTCY AND INSOLVENCY, III. 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, 9—CRIMINAL LAW, VII. 4—EXECUTORS AND ADMINISTRATORS, 6—FRAUDULENT CONVEYANCE, 5—JUDGMENT, V. 2—LIMITATION OF ACTIONS, 14—MINES AND MINERALS, I. 3, 5, II. 1—MORTGAGE, III.—PARTNERSHIP, IV. 7—PLEADING, IX. 3—PROHIBITION, II. 1—REGISTRY LAWS, II. 1—STATUTES, V. 1—WRIT OF SUMMONS, V. 4.

FRAUDULENT CONVEYANCE.

1. Action to set aside—*Status of creditor's creditor — Prescription.*]—*Held*, reversing the judgment in Q. R. 15 S. C. 577, that the creditor of a person who is himself creditor of a third, who has made a deed in fraud of creditors, may, in his name, as exercising the rights of his debtor, attack the deed and have it set aside; and the prescription against his action runs from the time he knew of the fraudulent conveyance, and not from the date of the judgment in his favour in garnishing proceedings against the fraudulent debtor as garnishee. *Charron* v. *Tourangeau*, Q. R. 16 S. C. 489.

2. Bill to set aside — *Injunction—Affidavit—Administration—Parties — Pleading—Judgment—Probate Court — Jurisdiction — Delay — Limitation of actions—Demurrer — Costs.*] — Under 53 V. c. 4, ss. 23, 24, a bill in an injunction suit need not be sworn to or supported by affidavit. It is only where an injunction is sought before the hearing that the bill must be supported by affidavit. In a suit by simple contract creditors of an intestate to set aside as fraudulent, under 13 Eliz. c. 5, a conveyance testate. The failure to make the administration by the Court of the estate, an administrator of the intestate's estate appointed by the Probate Court is a necessary party to the suit, though there are no personal assets of the intestate. The failure to make the administrator a party to such a suit is not a ground of demurrer but may be taken advantage of under Act 53 V. c. 4, s. 54. In such a suit it is not necessary for the plaintiff to allege that he has obtained or is in course of obtaining a judgment upon his debt. The Court will not in such a suit appoint a person under 53 V. c. 4, s. 89, to represent the estate of the intestate. Instead of requiring an administrator of the intestate's estate to be made a party to the suit. The Probate Court has jurisdiction to grant letters of administration where an intestate dies indebted possessed of real, but of no personal, estate. Delay cannot be set up against a creditor seeking to set aside a conveyance of lands as fraudulent under 13 Eliz. c. 5, where the creditor's debt is not barred under the Statute of Limitations at the commencement of the suit, In a suit commenced in 1899 by a creditor to set aside as fraudulent, under 13 Eliz. c. 5, a conveyance of land, the bill stated that the debt arose upon two promissory notes dated respectively in March and April, 1885, payable with interest three and twelve months after date; that the rates "were renewed and carried along from time to time by new or renewal or other notes, but have never been paid, but with interest thereon are still due to the plaintiff."—*Held*, that the allegations were too vague, general, and uncertain to shew a valid and subsisting debt, not barred by the Statute of Limitations at the time of the commencement of the suit, and that the bill was therefore demurrable. Where some of several grounds of demurrer were overruled, costs were not allowed to either side. *Trites* v. *Humphries*, 19 Occ. N. 407, 2 N. B. Eq. Reps. 1.

3. Bona fides of grantee.]—In an action to set aside a conveyance as fraudulent against creditors, the evidence shewing that there was an actual sale from the debtor to the claimant, and that, even if there was any fraudulent intent on the part of the former, the latter bought *bona fide*, the conveyance was held valid. *Steele* v. *Ramsay*, 1 Terr. L. R. 1.

4. Collusion—*Immoral consideration—Pleading—Amendment.*]—V., a miner and prospector, in 1896 engaged B. as a servant in an hotel kept by him in Revelstoke, on the understanding that the rate of wages would be fixed when he found out what she was worth, and some weeks afterwards he fixed the rate at $50 per month. A few months afterwards V. built a house, and he and B. lived there as man and wife. In November, 1898, V. made an assignment for the benefit of his creditors, having seven days previously conveyed to B. the house property for an alleged consideration of $1,200, as representing her wages for two years. She had never asked for wages before October, 1898, and then V. was hopelessly in debt:—*Held*, in an action to set aside the conveyance, on the ground of its being fraudulent under 13 Eliz. c. 5, that there was collusion between V. and B. to defeat V.'s creditors:—*Held*, also, that the conveyance was void on the ground that it was based on an immoral consideration; also, that, if necessary, the statement of claim could be amended to conform to the evidence. *Holten* v. *Vandall*, 20 Occ. N. 427, 7 Brit. Col. L. R. 331.

5. Exemptions—*Real Property Act—Burden of proof—Concealed fraud—Laches—Limitation of actions.*]—The plaintiffs were judgment creditors of the defendant McL., who at the time judgment was recovered was, and had since remained, in insolvent circumstances; and this action was brought to have it declared that two quarter sections of land which were bought after the recovery of the judgment in the name of the defendant McK. were held by her as a bare trustee for McL., or had been fraudulently transferred to her in order to hinder and defeat the creditors of McL. Both parcels of land had formerly belonged to McL., but they had been sold for arrears of taxes in 1886; and subsequently the purchasers, after negotiations carried on by McL. or his solicitor assigned the tax sale certificates to the defendant McK., a poor girl who lived with McL., her uncle. Tax deeds were issued to her by the municipality, and certificates of title under the Real Property Act were obtained for both parcels in her name. She claimed that she had furnished the money, $125, required to acuqire the tax sale certificates, but the evidence in support of this was not satisfactory to the Court, which held that the onus was upon her to establish this fact by clear and convincing proof, and the additional sum, about $125 more, required to complete the purchases and procure the certificates of title, was not provided by her. After the purchase, the charge and management of the lands were left wholly in McL.'s hands, and McK. had never received any rents or exercised any rights of ownership except that she agreed to a suggestion that her cousin, McL.'s son, made to her seven or eight years ago, that she should rent them to him. But no terms were discussed and he had paid her no rent. The evidence also shewed that the defendant McL. had himself cultivated and managed the farms for his own benefit, and had in fact always dealt with the lands as if they were his own, but in his evidence at the trial he stated that he had been working for his son in cultivating the land:—*Held*, that the plaintiffs were entitled to the relief asked for, and that s. 57 of the Real Property Act, R. S. M. c. 133, as amended by 55 V. c. 38, s. 4, does not prevent the granting of the relief, as it provides that a certificate of title is "subject to the right of any person to shew fraud wherein the registered owner has participated or colluded," and the law declares that such a transaction as was held to have been proved is fraudulent under 13 Eliz. c. 5, and McK. participated in it. *Barrack* v. *McCulloch*, 3 K. & J. 117, *Merchants Bank* v. *Clarke*, 18 Gr. 594, *Harris* v. *Rankin*, 4 Man. L. R. 129, and *Re Massey and Gibson*, 7 Man. L. R. 172, followed.—2. The Statute of Limitations could not be set up as a defence, as the fraud was a concealed one, and the plaintiffs, without any want of reasonable diligence, became aware of the facts only about eighteen months before the commencement of the action.—3. That the defendant McL., in view of the evidence given by himself at the trial, was not entitled to claim any part of the lands as exempt from seizure and sale. *Merchants' Bank* v. *McKenzie*, 18 Occ. N. 367, 20 Occ. N. 90, 13 Man. L. R. 19.

6. Foreign assignment of personal property—*Conflict of laws—Onus of proof—Garnishment—Equitable execution.*]—A share in the annual income of an estate in Ireland payable under will, through the hands of the executors living in New Brunswick, to the beneficiary living and domiciled in Massachusetts, was assigned by the beneficiary by assignment executed in Massachusetts to a trustee in trust, first to maintain the assignor and his family, and,

second, to pay his creditors a limited sum. In a suit in New Brunswick to set aside the assignment as fraudulent and void against a judgment creditor of the assignor, under 13 Eliz. c. 5:—*Held*, that the validity of the assignment should not be determined by the *lex domicilii* of the assignor; (2) that, assuming that the validity of the assignment should be determined by the law of Massachusetts, the onus of proving that the assignment was invalid by that law was upon the defendant, and that, in the absence of such proof, it must be assumed that the law of Massachusetts was the same as that of New Brunswick; (3) that, as the money coming into the hands of the executor was liable to attachment under 45 V. c 17, s. 21, or to equitable execution, the plaintiff was prejudiced by the assignment within 13 Eliz. c. 5. *Black* v. *Moore*, 20 Occ. N. 463, 2 N. B. Eq. Reps. 98.

7. Husband and wife — *Income — Gift.*]—Judgment in 31 O. R. 59, 19 Occ. N. 271, affirmed. *Rice* v. *Rice*, 20 Occ. N. 55, 27 A. R. 121.

8. Valuable consideration — *Judgment creditor — Tort—Cause of action.*]—In 1893 the defendant and his son entered into a parol agreement that the defendant should convey his farm to the son, and that the son should labour upon the farm and support his parents. The farm was not conveyed to the son until the 2nd October, 1895. On the 24th September and on the 10th October, 1895, the defendant spoke words alleged to be defamatory of the plaintiff. Before the date of the conveyance the plaintiff warned the defendant of her intention to bring an action against him for slander. An action was brought for the words spoken on both occasions, and the plaintiff obtained a verdict for $123, which on motion for new trial was reduced to $63, being the amount of damages awarded by the verdict in respect to the defamatory words uttered on the 10th October. At the date of the conveyance the defendant was not in debt. In a suit to set the conveyance aside as fraudulent and void against the plaintiff under 13 Eliz. c. 5:—*Held*, that the conveyance was not within the statute. *Gorman* v. *Urquhart*, 2 N. B. Eq. Reps. 42.

See BANKRUPTCY AND INSOLVENCY, III.—BILLS OF SALE AND CHATTEL MORTGAGES, 6.

FRAUDULENT PREFERENCE.

Land purchased by debtor—*Patent issued in brother's name.*]—In January, 1888, land was purchased from the Government in the name of J. McC., but the negotiations were conducted by R. McC., his brother. The price was one-fifth cash, balance in four yearly instalments. The money for the first payment was advanced by D. McC., another brother, and the other instalments paid by R. from the proceeds of the land. Since the purchase in 1888, the title had stood in the name of J., though it had been farmed and operated by R., either by himself and his brothers or by tenants placed on it by R. for his benefit. J. never disbursed one dollar for the land, nor received one cent from the same, or the proceeds thereof. After the last instalment was paid the patent was issued to J., though he admitted he never asked for it nor paid anything for its issue. The land was subsequently mortgaged, but J. received nothing of the amount obtained, and paid nothing of interest or principal. J. declared that R. acted as his agent, but R. never rendered him any account, and J. never asked for any, nor did J. pay any of the taxes. The plaintiff was a judgment creditor of R., and asked for a declaration that the land belonged in reality to R.; that it might be sold and the proceeds applied in payment of his judgment:—*Held*, that the land in question had been purchased in the name of and held by J. McC. for the sole benefit of R. McC.; that R. was the beneficial and real owner of the same; that the lands should be sold under the direction of the Court and the proceeds applied in satisfaction of the plaintiff's judgment against R.; the plaintiff to have the costs of the suit. *Miller* v. *McCuaig*, 20 Occ. N. 27.

See BANKRUPTCY AND INSOLVENCY, III.—TRIAL, IV. 4.

FRAUDULENT REPRESENTATIONS.

See VENDOR AND PURCHASER, 5.

FREE GRANT LANDS.

See CROWN, IV. 3.

FUNERAL EXPENSES.

See HUSBAND AND WIFE, VII. 3.

GAMING.

Promissory note — *Indorsement — Club.*]—The defendants indorsed a promissory note made in favour of the

plaintiffs, a club, by the manager of the club as security for a sum of money placed in the hands of the manager by the club for the purpose of promoting gambling :—*Held*, that the indorsement was void, and the plaintiffs could not recover upon it. *Le Club Canadien* v. *Jacotel*, Q. R. 16 S. C. 312.

See CONSTITUTIONAL LAW, 1—CRIMINAL LAW, III.

GARANTIE.

See INDEMNITY—SALE OF GOODS, V.

GIFT.

1. Conditions — *Acceptance — Third parties.*] — Whoever makes a gratuitous conveyance of property has a right to impose such conditions as he sees fit, provided that they be not contrary to law, and he has the right to impose such conditions not only upon the property gratuitously conveyed by him, but also upon any property in the hands of the person to whom the conveyance is made, and the acceptance of the gift by the donee gives full effect to the condition thus stipulated, in so far as it does not prejudice the rights then acquired by third parties. *Desjardins* v. *Michaud*, Q. R. 8 Q. B. 494.

2. Mortis causa—*Delivery of key to third person.*]—To effect a *donatio mortis causa*, delivery to a third person for the use of the donee is sufficient, provided that such third person is not a mere trustee, agent, or servant of the donor. The assent of the donee, or even his knowledge of the delivery, is not requisite.—Delivery of the key of the desk containing the property constitutes an actual delivery, and transfers the possession of and dominion over the same. judgment in 32 N. S. Reps. 156 reversed. *Walker* v. *Foster*, 20 Occ. N. 196, 30 S. C. R. 299.

3. Mortis causa—*Ratification by will —Mortgage—Discharge by executor—Rights of legatee.*]—J. A. C., the father of the respondent, had sold land to A. W. M. and C. B. M. for the price (secured by lien *de bailleur de fonds*) of $150,000, of which $50,000 was payable to the respondent after the death of the vendor, who subsequently made a will by which he ratified such gift and delegation of payment. Messrs. M. were the executors of this will. The appellants having become owners of the land by virtue of a title which obliged them to pay the amount due to the respondent, the Messrs. M., in their capacity of executors, gave a discharge of this sum and of the mortgage which secured it. In an action by the respondent *en declaration d'hypothèque*, seeking to set aside the discharge given by the executors :—*Held*, that, even supposing that the delegation of payment stipulated in favour of the respondent upon the sale of the Messrs. M. was void as containing a *donatio mortis causâ* by a deed *inter vivos*, that gift was validated by the subsequent will of J. A. C., and the debt in question passed to the respondent with its accessories and especially with the mortgage and the lien *de bailleur de fonds*.—2. Executors having seisin only for the purpose of executing the will, that is to say, for payment of debts and particular legacies, the Messrs. M. had not the power, in this case, to give a discharge to the appellants, there being nothing to shew that there was need of this sum for payment of the debts of the succession: on the contrary, one of the executors, the assignee of the other, had sold the land to the grantor of the appellants subject to the burden of paying the amount of the legacy to the respondent. *Consumers' Cordage Co.* v. *Converse*, Q. R. 8 Q. B. 511.

4. Parent and child—*Fiduciary relationship—Influence — Presumption—Onus —Absence of independent advice.*] — For fifteen years before his father's death the defendant managed his father's shop and his business generally, and did all his banking business under a power of attorney. For eleven years before the death the defendant and his wife and children all lived with the father in a dwelling above the shop. The fullest authority was given to the son and the fullest trust reposed in him. After the death of the father at the age of 78 in September, 1898, the son claimed a sum of $20,000, represented by a bank deposit receipt dated 3rd June, 1898, payable to himself, which he alleged was a gift from his father to himself or his children. He obtained the deposit receipt by drawing a cheque for the amount in his own favour upon his father's account and signing it with his father's name, by virtue of the power of attorney. The father died intestate, leaving the defendant and two other children. The sum of $20,000 represented more than one-fourth of the value of the estate. The trial Judge found that the $20,000 was a gift to the defendant's children, and ordered it into Court for their benefit :— *Held*, reversing this judgment, that, on grounds of public policy, the presumption was that the gift, even though freely made, was the effect of the influence induced by the confidential relationship which existed, and the onus was on the defendant to shew that his father had independent advice, or adopted the transaction after

the influence was removed, or some equivalent circumstances; and nothing of the kind was shewn in this case. *Morley* v. *Loughoran*, [1893] 1 Ch. 736, *Rhodes* v. *Bate*, L. R. 1 Ch. 252, and *Liles* v. *Terry*, [1895] 2 Q. B. 679, followed. Evidence was given to the effect that the deposit receipt was taken in the defendant's name in lieu of a promissory note made by the father in 1895, which itself was a renewal of an earlier note made in favour of the son as a settlement for his children, and that both notes had been destroyed:—*Held*, that the notes, if they existed at all for the purpose alleged, were incomplete gifts, not binding upon the deceased or his estate. The father at the time the transaction was carried out in June, 1898, was not legally bound to pay his note; he was ill and old; and the only adviser to whom he had recourse was the defendant. Therefore that time, and not the time when the notes were said to have been given, was the time at which the gift must be taken to have been made, if at all, and at which the effect of the lack of independent advice was to be considered. *Trusts and Guarantee Co.* v. *Hart*, 20 Occ. N. 65, 31 O. R. 414

See FRAUDULENT CONVEYANCE, 7—HUSBAND AND WIFE, VI., XI.—WILL.

GOOD-WILL.

See CONTRACT, I. 9—PARTNERSHIP, I. 1.

GRAND JURY.

See CRIMINAL LAW, VIII. 4.

GRAVEL.

See DEED.

GUARANTEE INSURANCE.

See INSURANCE, IV.

GUARANTY.

See CONTRACT, III. 2.

GUARDIAN.

See APPEAL, X. 8. XI.—EXECUTION, III. 5, 7, 8, 9—INFANT, II.—PARTITION, 2.

HABEAS CORPUS.

1. Application for — *Forum.*]—An application in vacation for a rule *nisi* for a writ of *habeas corpus* should be made in Chambers. *In re Soy King*, 7 Brit. Col. L. R. 291.

2. Exhaustion of writ—*Infant.*]—Where, on the return day of a writ of *habeas corpus*, the respondent appeared, and brought before the Court the child the possession of whom was sought by the petitioner, and the cause was subsequently struck from the roll by the Judge before whom it was pending, without any ulterior day having been fixed for the consideration thereof, and without the respondent having been bound by recognizance to appear on any later day to abide the judgment of the Court, the writ is exhausted, and the respondent and child cannot be forced to appear before the Court without a new writ. *McGovern* v. *McGee*, Q. R. 16 S. C. 551.

3. Powers of Court on — *Infant—Custody—Husband and wife.*]—The writ of *habeas corpus* is a means of preventing all restraint and assuring individual liberty; when there is no restraint, there cannot be an order upon a writ of *habeas corpus*.—2. All that the Court can do upon a writ of *habeas corpus* is to ascertain if there is restraint, and, if there is, to put an end to it.—3. The Court may, according to the circumstances, regard as restraint the taking away and detention of a child under the age of reason, and the withdrawal of this child from the care of his parents; if the child is under the age of reason, his being taken away from the care of his parents may be equivalent to restraint warranting the issue of a *habeas corpus*, and the right of the parents to have the care of their child, or the duty of the child to return to their care, may be equivalent to the desire to be set free and withdrawn from such restraint.—4. It is only in a case where the child is under restraint, or ought to be considered as being under restraint, and deprived of his liberty, that his return to his father should be ordered upon a writ of *habeas corpus*.—5. The Court would exceed its powers if, after having ascertained that there was no restraint, it should decide upon a contest between the parents for the custody of their children. —6. Although under Art. 243, C. C., the child should remain under the authority of his father until majority, it does not follow that the child should be considered as under restraint when he remains with the mother, she not residing with the father; if the child should be presumed to be under restraint from the fact alone that he draws himself from the paternal authority, he should be considered as

under restraint until the age of 21 or until his emancipation.—7. Upon a writ of *habeas corpus* a mother living apart from her husband will not be ordered to restore her son aged seven, who has accompanied her voluntarily, and who wishes to remain with her, to the custody of the father. *Daoust* v. *Schiller*, 2 Q. P. R. 529.

See CRIMINAL LAW, VIII. 1, X.—EXTRADITION—INFANT, I. 2.

HARBOUR.

See CROWN, IV. 7—SHIP, 2 — TRUSTS AND TRUSTEES, 6.

HARBOUR COMMISSIONERS.

See CERTIORARI, 3, 4.

HAWKERS.

See MUNICIPAL CORPORATIONS, XV.

HEIRS.

Right to share of money—*Partage.*]—An heir may, before any division of the estate, claim his share of a sum of money which falls by succession to him and his co-heirs. *Prévost* v. *Prévost*, Q. R. 16 S. C. 556.

See PARTIES, III. 1 — SUCCESSION—WILL, I. 2.

HIGH COURT OF JUSTICE FOR ONTARIO.

See APPEAL, VI., XIII. 2.

HIGHWAY.

See WAY.

HIRE RECEIPTS.

See BILLS OF SALE AND CHATTEL MORTGAGES, 5.

HOMESTEAD EXEMPTION ACT.

See REGISTRY LAWS, III. 3.

HOSPITAL.

See ASSESSMENT AND TAXES, III. 2.

HUSBAND AND WIFE.

I. ACTIONS BY AND AGAINST—PARTIES.
II. ALIMENTARY DEBTS AND ALLOWANCES.
III. ALIMONY.
IV. BREACH OF PROMISE OF MARRIAGE.
V. COMMUNITY.
VI. MARRIAGE CONTRACT.
VII. SEPARATE ESTATE OF WIFE.
VIII. SEPARATION.
IX. SURETYSHIP.
X. SURVIVORSHIP.
XI. OTHER CASES.

See ATTACHMENT OF DEBTS, I. 11, 12—BILLS OF SALE AND CHATTEL MORTGAGES, 6—CANADA TEMPERANCE ACT, 3—CRIMINAL LAW, I.—DOWER—FRAUDULENT CONVEYANCE, 7—HABEAS CORPUS, 3—JUDGMENT, II. 3—MARRIAGE—PARTICULARS, II. 1.

1. ACTIONS BY AND AGAINST.

1. Joint action—*Defamation—Incidental demand.*]—The action as originally brought by husband and wife complained merely of the defamation of the wife's character; an incidental demand afterwards added complained of words uttered on the same occasion imputing misdeeds to the husband at the instigation of his wife, which complaint had been by mistake omitted at first:—*Held*, that there was identity in the causes of action contained respectively in the two demands and connection between them. — 2. The appellants, being common as to property, had both a cause of action in the two demands, and therefore the incidental demand was properly made by them under the provisions of Art. 215, C. C. P. *Charest* v. *Tessier*, Q. R. 8 Q. B. 500.

2. Joint defendants—*Appearance—Presumption.*]—A married woman made a defendant to an action jointly with her husband—joined for the purpose of authorizing her — is presumed to be regularly before the Court if the parties have appeared by the same attorney and if no protest has been made by the husband. *Brousseau* v. *Déchene*, Q. R. 17 S. C. 350.

3. Joint defendants — *Slander by wife.*]—In an action for damages for

slanderous words uttered by a married woman, the defendant's husband cannot be jointly condemned unless he is alleged to have become in any way responsible for his wife's statements, and the conclusions against him personally will be struck off on demurrer. *Camiré* v. *Bergeron*, 3 Q. P. R. 281.

4. Wife sued alone—*Money demand—Appearance by husband.*]—The defendant, a *marchande publique*, was doing business authorized by her husband. An action was instituted against her for a claim arising out of her business, the writ being served upon her personally and not upon the husband. Both the defendant and her husband appeared by attorney on the return of the writ, but did not plead. On an inscription for judgment *ex parte*:—*Held*, that the husband should have been served with the writ, and not having been so served, judgment could not be rendered against the defendant. *Stsenwain* v. *Roque*, 2 Q. P. R. 469.

5. Wife suing alone—*Authorization—Trespass—Release.*]—A wife, common as to property, may, with the authorization of her husband, sue for trespass to her person, such a claim binding the community so that a release granted by the wife in the presence of her husband would be valid. *Laurin* v. *Desrochers*, Q. R. 17 S. C. 351.

6. Wife suing alone—*Death—Revivor—Curator—Appointment of—Intervention.*]—The plaintiff, a married woman *séparée de corps*, sought to set aside a sale of land made by her husband, alleging that she was the owner. She died while the action was pending, her succession was declared vacant, and the curator proceeded with the action. The husband intervened, demanding that the appointment of a curator should be set aside, the substitution of himself for the curator appointed, and his being put in possession of his wife's property. The curator opposed the intervention, first, because the husband was already a party to the suit as *mis en cause*; 2nd, because the appointment of a curator can only be set aside in a direct action.—*Held*, without admitting that the intervention was well founded, that it could be set aside upon the grounds alleged. *Carrière* v. *Saint Pierre*, 3 Q. P. R. 299.

7. Wife suing alone—*Death of child by former marriage—Damages for—Costs.*]—An action for damages for the death of a child born of a former marriage should be brought by the second husband of the victim's mother, if she is *commun en biens* with her husband.—If objection to an action brought by the wife is taken by demurrer *ore tenus*, the action will be dismissed, but without costs of the hearing. *Lefebvre* v. *Dominion Wire Mfg. Co.*, 3 Q. P. R. 224.

8. Wife suing alone—*Personal services—Administrator—Notice — Corroboration.*]—A married woman has no right of action for nursing a person boarding with her and her husband, unless there has been a special agreement with her to pay her for such service; and in that case she should sue for it alone. *Young* v. *Ward*, 24 A. R. 147, distinguished.—The claim of a creditor against the estate of a deceased person, whose domicil was in Manitoba, is not barred in a Manitoba Court by failure to sue within six months after a notice under s. 31 of R. S. M. c. 146, repudiating the claim given by an administrator of such estate appointed by a foreign Court, though the letters of administration be afterwards re-sealed in Manitoba pursuant to the Surrogate Courts Act. Such a notice, to be effectual, must be given by the person who is at the time the duly appointed administrator of the estate in Manitoba. — Whilst the evidence of a claimant against the estate of a deceased person should be clear and convincing, and, if not corroborated, will not be readily acted on, there is no absolute rule of law requiring such corroboration in this Province. *In re Garnett*, 31 Ch. D. 1, and *In re Hodgson*, *ib.* 177, followed. *Doidge* v. *Mimms*, 20 Occ. N. 90, 13 Man. L. R. 48.

II. Alimentary Debts and Allowances.

1. Action by wife — *Allowance for self and children.*]—A married woman is entitled to sue in her own name for an alimentary allowance for her own support and that of her minor children, although she has not been appointed tutrix to the children. *Gallagher* v. *McEnroe*, Q. R. 17 S. C. 204.

2. Debts of wife—*Necessaries.*]—A debt for clothing is of an alimentary nature, and the onus is upon the defendant to prove that the clothing was not ordinary or necessary, or that the price was too high for his means. *Richer* v. *Arnton*, 2 Q. P. R. 560.

III. Alimony.

1. Desertion—*Offer to receive wife back—Bona fides.*]—In an action for alimony, on the ground of desertion, in order to give effect to the husband's offer and willingness to receive back his wife, the Court must be satisfied that it is made *bonâ fide*, and not merely set up to

prevent the pronouncement of judgment against him. *Crothers* v. *Crothers*, 1 P. & D. 568, specially referred to. *Rae* v. *Rae*, 19 Occ. N. 34, 20 Occ. N. 64, 31 O. R. 321.

2. Interim allowance — *Costs—Disbursements — Undertaking.*] — Notwithstanding the language of Rule 1144— "only the amount of the cash disbursements actually and properly made by the plaintiff's solicitor"—an order may be made in an action for alimony for payment by the defendant to the plaintiff's solicitor of a sum to cover prospective witness fees, upon the undertaking of the solicitor to account for all sums not actually and properly disbursed. *Stevenson* v. *Stevenson*, 19 Occ. N. 392, 19 P. R. 48.

3. Interim allowance — *Deed of separation — Subsequent reconciliation — Desertion.*] — The parties were married on the 20th December, 1898. On the 20th May, 1899, the defendant deserted the plaintiff until the 25th June following, when he returned to her, but immediately after deserted her again and left her without any means of support. The defendant, in answer to a motion for interim alimony, relied on the fact that when he and the plaintiff separated in May, 1899, they joined in a deed of separation by which the defendant was to pay the plaintiff $100 on the 1st November, 1899, which the plaintiff agreed to accept and take in full satisfaction for her support and all alimony whatsoever during her coverture.—*Held*, that the plaintiff was entitled to interim alimony, which, under the circumstances, should be $3 a week, with $20 for cash disbursements. Whether the deed, if the parties had continued to live apart after it was executed, would disentitle the plaintiff to the order for interim alimony, was a question that would require consideration, but the effect of the reconciliation was to put an end to the deed. *Brewster* v. *Brewster*, 20 Occ. N. 182.

4. Interim allowance — *Disbursements — Residence.*] — In an action *en séparation de corps et de biens* by a wife against the husband, which is contested, she has a right to require from him payment of interim alimony and disbursements in the cause. Wife also allowed to change the place of residence assigned to her at the beginning of the suit. *Keily* v. *Lavery*, 3 Q. P. R. 129.

5. Interim allowance—*Reduction.*]—Upon the application of the defendant, the husband, an order was made reducing the amount of interim alimony payable to the plaintiff, the wife, under a former order, upon shewing that the necessities of the wife had diminished. *Doudiet* v. *Hardman*, 2 Q. P. R. 447.

See *post* VIII. 4, 5.

See, also, VACATION.

IV. BREACH OF PROMISE OF MARRIAGE.

Capias—*Damages.*]—The fact that a defendant, sued for damages for breach of promise of marriage, has said to the plaintiff that he would go to the United States to get rid of her if she insisted that their marriage should take place within the time agreed upon, is not sufficient ground for the issuing of a *capias* against him, if there is nothing to shew that he intended to carry out his threat and defraud the plaintiff.—2. The failure to carry out a promise of marriage does not, of itself, make the promisor liable to damages, but it may become actionable, and afford ground for the application of Art. 1053, C. C. —3. When the breach is imputable to a fault, and real prejudice results from such fault, the action for damages does not arise from the validity of the intention to marry, but from the fact of the prejudice caused and the obligation imposed by the law upon the person who caused the prejudice, to atone for it. 4. The fact that the defendant has withdrawn *unseasonably* and without reason his promise of marriage gives rise to an action for damages, and the plaintiff is entitled to be indemnified for the loss of her employment, travelling expenses and trousseau, and against injury arising from the difficulty of establishing herself for the future, having regard to the respective stations and means of the parties. *Walker* v. *Goldman*, Q. R. 16 S. C. 466.

See INFANT, III. 1.

V. COMMUNITY.

1. Death of one consort—*Continuation of community — Inventory — Prescription.*]—At the time of the dissolution of community by the death of one of the consorts in 1845, the common assets consisted of bare necessaries of small value and exempt from seizure. There was no inventory or *procès-verbal de carence* made, and, subsequently, the survivor contracted a second marriage. In an action by a child of the first marriage claiming a share in continuation of community:—*Held*, that there was no necessity for an inventory of property of such insignificant value, and that failure to make an inventory or *procès-verbal de carence* did not, under the circumstances, effect a continuation of community.

Judgment in Q. R. 9 Q. B. 44 reversed. *King* v. *McHendry*, 20 Occ. N. 373.

2. Debt due to wife—*Attachment—Affidavit.*]—An affidavit for an attachment, made in a cause in which the plaintiff is described as a married woman, without saying that she is *séparée de biens* and stating that the defendant owes the plaintiff, personally, a sum there mentioned, is irregular, because the married woman is presumed to be *commune en biens*, when it is not said that she is *séparée de biens*, and the debt due to the married woman is a debt of the *communauté*, and hence of the husband. *Shorey* v. *Hamilton*, 2 Q. P. R. 574.

3. Personal injuries—*Right of action—Pleading—Appeal.*]—The right of action for damages for personal injuries sustained by a married woman, *commune en biens*, belongs exclusively to her husband, and she cannot sue for the recovery of such damages in her own name, even with the authorization of her husband to bring the action.—Where it appears upon the face of the writ of summons and statement of claim that the plaintiff has no right of action, it is not necessary that objection should be taken by pleading *exception à la forme*. Absolute want of a legal right of action may be invoked by a defendant at any stage of a suit:—*Held*, also, not a mere question of procedure upon which the Court would hesitate to interfere. Judgment of the Court below, 3 Q. P. R. 1, 111, Q. R. 15 S. C. 390, Q. R. 9 Q. B. 367, affirmed on different grounds. *McFarran* v. *Montreal Park and Island R. W. Co.*, 20 Occ. N. 323, 373, 30 S. C. R. 410.

4. Promissory note — *Debt of community — Action against wife—Costs.*]—A married woman was sued upon two promissory notes. The writ of summons described her as a merchant carrying on business under a firm name. It was not, however, alleged by the plaintiff that the notes had been made for the purposes of the business, nor with the authorization of her husband; and it was in fact established that the notes were given for a debt of the *communauté*:—*Held*, that the husband should have been sued alone.—This objection not having been raised by the plea, but only at the hearing, the defendant was allowed only such costs as she would have been entitled to under a judgment upon a confession of plea. *Perron* v. *Duguay*, Q. R. 17 S. C. 192.

VI. Marriage Contract.

1. After-acquired goods—*Donatio mortis causâ.*]—A clause of an antenuptial contract by which the future husband gives to the future wife all the furniture in the matrimonial domicil, including what may be acquired by the husband during the marriage, such gift becoming void in case of the predecease of the wife, constitutes a gift *mortis causâ*, and confers on the wife the actual property only in the goods which the husband possessed at the time of the marriage. *Newman* v. *Despocas*, Q. R. 17 S. C. 477.

2. Gift to wife — *Contemplation of death—Creditors.*]—The question whether a donation of future property is in contemplation of death is one of fact, which is to be decided by reference to the terms of the deed; and where it is stipulated in a marriage contract that all articles of household furniture from time to time provided by either consort for the common domicil shall belong to the wife, the gift, by its terms, is not made in contemplation of death, and the stipulation is valid. Where such a clause exists in the marriage contract, articles of furniture acquired for the common domicil become the property of the wife before the death of the donor, and may be seized therein by her judgment creditors. *Desrochers* v. *Roy*, Q. R. 16 S. C. 273.

See Insurance, V. 7.

VII. Separate Estate of Wife.

1. Action by wife against husband—*Promissory note — Indorsement — Contract.*]—In 1882 the respondent made a promissory note for $10,000 in favour of J. L., payable on demand. This note was indorsed by the payee to her sister, the maker's wife. In 1899 an action was brought on the note by the indorsee against her husband, the maker, which at the trial was dismissed on the ground that the Married Woman's Property Act did not authorize such an action: 19 Occ. N. 326. On appeal to the Court *en banc* the Judges were equally divided in opinion, and the judgment at the trial stood affirmed: 20 Occ. N. 136, 32 N. S. Reps. 1. By R. S. N. S., 5th ser., c. 94, a married woman in Nova Scotia holds her separate personal property, not reduced into possession by her husband, as if she were a *feme sole*, and the Act of 1898, c. 22, gives her the same civil remedies against every person, including her husband, as an unmarried woman has:—*Held*, reversing the judgment, that the note sued on was personal property of the wife not reduced into possession, and the action could be maintained under the above Acts by the wife against her husband. *Michaels* v. *Michaels*, 20 Occ. N. 450.

2. Action relating to separate estate—*Parties—Next friend.*]—Husband and wife should not be joined as co-plaintiffs in a suit relating to the wife's separate property. The suit should be in the name of the wife's next friend, or, since the Married Women's Property Act, 58 V. c. 24 (N. B.), it may be in the wife's name. *Cronkhite* v. *Miller*, 2 N. B. Eq. Reps. 51.

3. Funeral expenses.] — Under the circumstances of this case, the separate estate of a married woman was made liable for her funeral expenses. *In re Gibbons*, 19 Occ. N. 340, 31 O. R. 252.

4. Settlement—*Creditor of husband.*] —The claimant was married in England. By her marriage settlement, there were settled upon her, to her separate use, certain moneys over which she was given a power of appointment; she exercised the power by appointing a part to her own separate use. This was paid or sent to her in the Territories. With it she bought farm stock, which was used on her farm; but it was found as a fact that it was the husband who carried on the farming operations. In the absence of evidence that the husband had constituted himself a trustee for the wife:—*Held*, that the farm stock had become the husband's property, notwithstanding the settlement or the provisions of the N. W. T. Act. *Brittlebank* v. *Gray-Jones*, 1 Terr. L. R. 70.

VIII. Separation.

1. Adultery of plaintiff — *Cross-action — Pleading — Exception — Particulars.*]—In an action for *séparation de corps* the defendant cannot set up as a defence that it is the plaintiff who has been guilty of adultery and ask that, if a decree for *séparation de corps* is pronounced, it shall be against the plaintiff; that is the subject of a cross-action.—2. Such a defence should be attacked by way of exception to the form, and not by demurrer; and upon demurrer *preuve avant faire droit* will be ordered.—3. Upon demand of particulars of such allegations of adultery, the defendant will be ordered to give the names of the men with whom the plaintiff has committed adultery, and, as far as possible, the times when and places where such acts of adultery were committed. *Thessereau* v. *Robert*, 2 Q. P. R. 520.

2. Costs of defence.] — A woman sued *en séparation de corps* is not entitled to compel her husband to furnish her with the money necessary for her defence. *Privé* v. *Bradley*, 2 Q. P. R. 385.

3. Cruelty—*Condonation.*]—Where the husband had been guilty of cruelty, which had been condoned, but within the six months subsequent to the condonation had been guilty of violent and harsh treatment which would not originally of itself constitute a ground for separation, the Court granted a separation to the wife. *Town* v. *Town*, 7 Brit. Col. L. R. 122

4. Desertion—*Alimony.*]—The leaving of her husband's house by the wife and her refusal to return thither in spite of the requests of the husband, constitute a grave injury to the latter which gives him a right to demand *séparation de corps* and exempts him from liability for alimony. *Doyon* v. *Riopel*, 2 Q. P. R. 522, Q. R. 17 S. C. 488.

5. Judgment — *Execution — Time — Proceedings — Posting and entry of judgment—Effect of default.*] — All essential formalities having been accomplished, and in the absence of fraud, the execution of a judgment for *séparation de biens* may be procured, or at least the proceedings to obtain it may begin, at any time after the delay fixed by Art. 612 C. P., subject to the prescription enacted by Art. 2265, C. C.—By "*procédures aux fins d'obtenir le paiement des droits et reprises de la femme*" (Art. 1098, C. P.), is meant all that is done with the object of winding up the *communauté*, for example, an inventory, a compromise.—3. Failure to post up and enter the judgment for *séparation de biens* is a ground for setting aside the execution as regards third persons; it is not a ground as regards the parties to the suit, and it does not prevent the judgment from taking effect, as regards such parties, from the day of the demand. *Tourneur* v. *Drouin*, 3 Q. P. R. 169.

6. Non-support of wife—*Defence—Misconduct.*]—In an action *en séparation de corps* begun by the wife on account of the refusal of the husband to support her, her misconduct before marriage or since does not constitute a ground of defence. *Pilnik* v. *Numizinski*, Q. R. 16 S. C. 231.

7. Petition for leave to sue—*Vague allegations.*]—The Court, before granting to the wife an authorization to sue for separation from bed and board, may require her to specify the acts of cruelty committed by the defendant and the particular insults which she pretends were uttered. *Alary* v. *Phillips*, Q. R. 16 S. C. 605.

See Appeal, IV. 5 — Infant. I. 4 — Will, II. 1.

IX. Suretyship.

Wife as surety — *Debt assumed by husband.*]—*Held*, affirming the decision in Q. R. 15 S. C. 115, that a wife (*séparée de biens*) cannot become surety for the debt of a third person after such debt has become that of her husband—who in this case had continued the business of the third person and assumed all his obligations—such an obligation being presumed to be contracted for the husband; but the fact that the husband had thus assumed the obligations of the third person did not affect a prior security which the wife had given for the benefit of this third person. *Mullin* v. *Mullarky*, Q. R. 8 Q. B. 441.

X. Survivorship.

Savings deposit.]—Where a husband deposited money with a savings company and caused an account to be opened in the names of himself and his wife jointly, "to be drawn by either or in the event of the death of either to be drawn by the survivor," and it appeared by her evidence, uncontradicted, that money of hers went into the account and that both drew from it indiscriminately:—*Held*, that she was entitled as survivor to the whole fund. *In re Ryan*, 20 Occ. N. 426, 32 O. R. 224.

XI. Other Cases.

Purchases by husband in names of wife and daughter — *Advances—Account by mandatory before action — Gifts.*] — The appellant, after his wife's death, sued his daughter to recover moneys which he alleged that he had advanced to purchase properties in Quebec to which she was entitled either in her own right or under his wife's will:—*Held*, on the evidence, that he had failed to establish his claim. *Quære*, whether advances made as his wife's mandatory in charge of her estate could be recovered in a suit brought before he had rendered an account of rents and moneys received in that character as well as disbursements.—*Quære*, also, if the advances were in the nature of gifts, whether those gifts were valid by the Quebec law or by s. 6, C. C. P. *Eddy* v. *Eddy*, [1900] A. C. 299.

IMPRISONMENT.

See Arrest, III. 10—Canada Temperance Act—Company, IV. 2—Criminal Law.

IMPROVEMENTS.

See Mines and Minerals, I. 4, 5, 8, II. 1—Municipal Corporations, V. — Patent for Invention, 2 — Water and Watercourses, II. 1.

INCEST.

See Criminal Law, VII. 7.

INDEMNITY.

1. Right of action en garantie.]—The defendant is not entitled to bring an action *en garantie* (and to obtain a stay of the principal action) where the defendant is himself the principal debtor and the person whom he seeks to charge *en garantie* has engaged to pay the debt for which he is sued. The object of the action *en garantie* is to defend and indemnify; a simple case of *garantie* is where one person is sued for a debt which is not his; he has then the right to call upon the principal debtor to intervene and defend him, and, if the defence is not successful, indemnify him. *Rocher* v. *David*, 3 Q. P. R. 198.

2. Right of action en garantie.]—Recourse in warranty exists wherever the person sought to be charged as warrantor is, by the effect of an agreement between him and the party so seeking to charge him, bound to protect the latter or indemnify him for the condemnation sought to be obtained against him. *Chenevert* v. *David*, 3 Q. P. R. 201.

See Executors and Administrators, 5—Principal and Agent, 3—Receiver, 3 — Replevin, 1 — Way, V. 4.

INDIANS.

See Constitutional Law, 8, 9—Criminal Law, I., IX. 1—Execution, I. 2.

INFANT.

I. Custody.
II. Guardian.
III. Other Cases.

See Appeal, XIV. 6—Criminal Law, VI. 1—Habeas Corpus, 2, 3—Negligence, 3—Payment of Money out of Court.

I. Custody.

1. Bastard—*Benefit of child.*]—Application by the mother of a two-year-old

illegitimate child for an order awarding the applicant the custody of the child for the purpose of placing it in a charitable institution. The child was at the time of the application in the custody of the father. The mother was admittedly of bad character. The father's reputation was not good, but he was now married to a respectable woman who would care for the child :—*Held*, that it was not for the child's interest to remove her from her present surroundings, as there was no guarantee that the institution would do more than board her, nor that it would continue to do even that for any length of time. *In re Borntilier*, 20 Occ. N. 47.

2. Parent—*Habeas corpus.*]—However clear may be the right of a father to the control and custody of his minor child, such right cannot, where its enforcement is not essential to the securing of the liberty of such minor child, be enforced by a writ of *habeas corpus*. *Re Vautrin and Dupuis*, 3 Q. P. R. 232.

3. Parent—*Religious faith of—Conduct—Estoppel.*]—The order of Townshend, J., 19 Occ. N. 364, was reversed on appeal ; Ritchie, J., dissenting. — *Held*, that the father had been guilty of no conduct which should deprive him of the comfort of his daughter's companionship and the direction of her education. *In re Marshall*, 20 Occ. N. 136 ; 33 N. S. Reps. 104.

4. Parents — *Separation of—Access—Proceeding for leave—Second petition—New facts.*]—When, in an action *en séparation de corps*, the judgment granting the separation has given the custody of the children to the wife, the husband may, upon a mere petition, and without the issue of a writ of summons, obtain leave to visit his children from time to time and to care for their education if necessary.—2. The dismissal of a former petition for the same relief does not prevent the husband from presenting a new petition based upon new facts. *Delisle* v. *Pillet*, Q. R. 17 S. C. 75.

5. Person in loco parentis—*Bigamy.*]—A girl aged fourteen was taken by a Refuge Home from the custody of a person standing in *loco parentis* who was proved to be leading a bigamous life:—*Held*, in *habeas corpus* proceedings, that such person had lost his right to the custody of the infant. *In re Soy King*, 7 Brit. Col. L. R. 291.

II. Guardian.

1. Appeal — *Leave — Family council—Will—Legacy—Interim enjoyment — Seduction.*] — Although a guardian cannot, under Art. 306, C. C., appeal from a judgment until he has been authorized by the Judge or the prothonotary upon the advice of the family council, nevertheless, when the guardian has had his appeal ratified by the family council after it has been brought, the Court will permit him to produce the authorization, but he will have to pay the costs of his petition to be allowed to do so. *Clement* v. *Francis*, 6 L. N. 325, and *Laforce* v. *Town of Sorel*, M. L. R. 6 Q. B. 109, followed. — In this case the grandmother of the infants had bequeathed a sum of money payable to them at majority, and had declared that such sum should be paid to the respondent, their step-father, and be retained by him until the arrival of the time for payment :—*Held*, that the fact that the respondent had seduced one of the infants was not a reason for depriving him of the enjoyment of the sum bequeathed in the interim. *Greenwood* v. *Dent*, Q. R. 9 Q. B. 11.

2. Marriage — *Pleading.*]—An infant emancipated by marriage has the right to appear in Court, either as a plaintiff or defendant, without the intervention of a guardian, in a personal action.—2. The defendant pleading his minority, it is proper for the plaintiff to reply the emancipation. *Cloutier* v. *Cloutier*, 2 Q. P. R. 397.

3. Party to action—*Costs.*] — Upon *exception à la forme* by the defendant alleging his infancy, time will be given to the plaintiff to procure the naming of a guardian for the defendant ; the costs of the exception will be reserved. *Gareau* v. *Denis*, 2 Q. P. R. 389.

III. Other Cases.

1. Breach of promise of marriage — *Liability of father.*] — In an action against the father of a minor daughter, for having caused the minor to break her promise to marry the plaintiff, the latter is not entitled to recover damages against the father, where it appears that it was of her own free will that the girl refused to carry out the proposed marriage, and that the father did nothing to prevent such marriage.—2. Damages cannot be recovered from the father under Art. 1054 of the Civil Code, for the fault of his child, unless such damages have been specially alleged and demanded by the action. *Delage* v. *Normandeau*, Q. R. 9 Q. B. 93.

2. Fund—*Payment into Court—Trustee Discretion.*]—The defendant, having in her hands a fund to the benefit of which the plaintiff, an infant, was entitled, asserted that, by the terms of the trust

upon which she held it, she had a discretion as to the application of it for the benefit of the plaintiff. She nevertheless paid the money into a bank to her own credit as trustee for the plaintiff, and agreed that she would not use it except for his benefit, and would pay it to him at majority :—*Held*, that the defendant was a mere trustee for the plaintiff without the discretion which she contended for; and a summary order, made before delivery of statement of claim in an action to recover the fund and for an injunction, requiring the defendant to pay the fund into Court, and thereupon perpetually staying the action, was affirmed. *In re Humphries, Mortimer* v. *Humphries*, 18 P. R. 289, 18 Occ. N. 382, approved. *Whitewood* v. *Whitewood*, 20 Occ. N. 254, 19 P. R. 183.

3. Sale of lands—*Requisites—Price.*] —Upon an application in Chambers to sell the lands of an infant, the character of the lands sought to be sold and their value should be clearly put before the Judge on affidavit, and no matter how seemingly good a proposed sale may be, it should be shewn that the lands have been open to competition among prospective buyers in the vicinity of the lands before an order to sell to an individual will be granted. *In re Donkin*, 20 Occ. N. 353.

INJUNCTION.

I. Interim Order.

II. Other Cases.

See Assessment and Taxes, VI. 1—Contract, I. 5, 9 — Crown, IV. 7—Fraudulent Conveyance, 2 — Municipal Corporations, IV. 2—Railways and Railway Companies, XI. 1 — Trusts and Trustees, 6—Way, VII. 2.

I. Interim Order.

1. Costs—*Municipal corporation—Illegal purchase of land.*]—Action by a ratepayer of a city for an injunction restraining the corporation from entering into a certain agreement for the lease and purchase of land for a hay market. In 1898 the lessor, C., leased the land to the city for ten years; subsequently he offered to cancel the lease and make a new one on certain terms; and, on receipt of the amounts named in the lease, he proposed to convey the land to the city in fee. This offer was accepted, and the matter referred to the city solicitors; after it had been so referred the solicitors were advised that certain ratepayers objected to the proposed arrangement and intended to attack the transaction as illegal. C. then wrote the solicitors a letter with an alteration of the terms proposed. After the submission of this proposal by C., and before its consideration by the city council, this action was commenced, and a motion made for an interlocutory injunction. This motion was several times adjourned, and while it was pending C.'s latest proposal was submitted to the council and rejected. After the last adjournment, and before the motion finally came on for hearing, a new arangement was entered into, so far varying the original proposition that the injunction was not pressed for, and, by agreement, the only question submitted was that of the costs of the action and motion:—*Held*, that the defendants should pay the costs of the action and the motion. *Shrimpton* v. *City of Winnipeg*, 20 Occ. N. 248.

2. Damages — *Review — Appeal.*]—Under the new Code of Civil Procedure the writ of injunction can no longer be granted upon a principal demand; the proceeding to obtain it is accessory to a principal action, and conservatory in its nature.—2. It is granted by the Judge only to prevent the destruction of property or other rights which the plaintiff claims in his action, but never in an action for damages.—*Semble*, that the legal remedy, when a motion to dissolve an injunction for default of notice to the defendant has been dismissed, is not review but appeal to the Court of Queen's Bench. *McArthur* v. *Coupal*, Q. R. 16 S. C. 521.

3. Motion to dissolve — *Necessity for.*]—Where an interim injunction is granted to a day certain, and a motion to continue is necessary to extend it beyond such day, a motion to dissolve is improper, except where it is desired to get rid of the interim order before the day named. *McCuaig* v. *Conmee*, 20 Occ. N. 14, 19 P. R. 45.

4. Petition — *Amendment.*] — Under Arts. 988 and 980 a writ of injunction can issue only upon a petition supported by affidavit, but that does not prevent the petition being amended after the issue of the writ under Art. 513; at all events in cases where the effect is not to contradict or withdraw any of the allegations of the petition upon which the order for the issue of the writ was based. And in a case where the amendment was supported by affidavit, a motion to set it aside was refused. *Royal Electric Co.* v. *Morrice*, 2 Q. P. R. 563.

5. Petition—*Municipal corporations—Resolution — Final judgment — Separate hearing.*] — An interlocutory injunction was issued upon a petition made as an incident in a pending cause, whereby the annulment of certain resolutions of

the police committee and of the council of the defendant city corporation was prayed for,—the petition, besides praying for an interlocutory injunction, praying also for the annulment of said resolutions :—*Held*, that under Art. 968, C. P., the conclusions of a petition for injunction, other than those upon which the interlocutory injunction issues, are to be adjudicated upon by the final judgment which at the same time adjudicates upon the merits of the action. Therefore an inscription for proof and final hearing on the merits of the petition for injunction separately from the main action is irregular, and will be rejected on motion. *Martin* v. *City of Montreal*, Q. R. 17 S. C. 95, 2 Q. P. R. 475.

II. Other Cases.

1. Payment of money to debtor—*Request for assignment — Attachment of debts.*]—Where a creditor suspects that a certain sum of money due to his debtor (who has refused to assign for benefit of creditors) will, if paid to the latter, be placed where creditors cannot get at it, he is not entitled to a judgment restraining the person who owes the debtor from paying to him and the debtor from receiving ; his only remedy is by garnishing proceedings. *Dowker* v. *Lynn*, Q. R. 17 S. C. 320.

2. Peremptory writ—*Petition—Trial—Patent for invention.*]—A petition for a peremptory injunction cannot be heard before the regular and ordinary trial of the action, and cannot be the subject of a special early hearing, even in an action for the infringement of a patent. *Consolidated Car Heating Co.* v. *Caine*, 2 Q. P. R. 401.

3. Simple contract creditor—*Execution before judgment.*] — *Held*, Wetmore, J., dissenting, that, as in the North-West Territories property can be attached before judgment by virtue of s. 394 of the Judicature Ordinance, No. 6 of 1893, as amended by s.-s. 53 of s. 1 of No. 6 of 1897, so equitable relief by way of injunction or receiving order may be granted before judgment, in a proper case, to prevent the payment to the defendant of moneys to which he is equitably entitled; but this relief should not be granted except on material as complete and positive as that required for the issue of writs of attachment or garnishing process. *Pacific Investment Co.* v. *Swann*, 20 Occ. N. 152.

INQUEST.

See Criminal Law, VIII. 2.

INSOLVENCY.

See Bankruptcy and Insolvency—Company, II.

INSPECTION.

See Discovery, II.

INSURANCE.

I. Accident.
II. Employers' Liability.
III. Fire.
IV. Guarantee.
V. Life—Benefit Society.
VI. Life—Other Cases.
VII. Marine.
VIII. Plate Glass.

See Constitutional Law, 2 — Defamation, 3.

I. Accident.

1. "Immediate notice."]—A condition in an accident insurance policy was that, in the event of injury, immediate notice should be given in writing, and failure to give such notice should invalidate all claims:—*Held*, that a notice two months after the accident was sufficient where it was given as soon as serious injury from the accident was apprehended:—*Held*, also, that the notice given was, under the circumstances, sufficient, although written notice was not actually served upon the insurers. *Warne* v. *London Guarantee and Accident Co.*, 20 Occ. N. 227.

2. Master and servant—*Contract.*]—McK. was in the employment of the respondents when they announced to their workmen that henceforth they would have them insured against accidents to the amount of $1,000 in case of death, adding: "This gives each employee protection against accident while at work or otherwise engaged. The respondents deducted from the wages of their men ten cents a week as premium, and made a contract of insurance with a company, the policy stipulating for immunity from liability in the case of wilful and wanton exposure to unnecessary danger. While McK. was thus in the employment of the respondents, he was one day passing through a street where two live electric wires were lying on the ground, and, having some knowledge of electric currents, he thought he could move the wires in such a way as to prevent danger to passers-by, and,

in spite of warnings from by-standers, he seized the two wires, and was killed by the shock:—*Held*, that the heirs of McK., in spite of his imprudence, were entitled to receive the insurance moneys, the contract applying to every accident happening while the employee was at work or while he was otherwise occupied.—2. The respondents, in imposing this contract upon their employees, did not act as agents of the insurance company with which they had insured, and they could not set up against McK.'s representatives the conditions of nullity contained in the policy.—3. This contract of insurance was an accessory of the contract of hiring, and did not fall within the prohibition of the general Insurance Act of Canada, 49 V. c. 24. *McKenzie* v. *Garth*, Q. R. 9 Q. B. 224.

II. Employers' Liability.

Contract—*Alteration after execution — Agent—Authority.*]—A local agent of an English insurance company, without authority from any one, upon the request of the assured, and after some correspondence with the chief agent for the company in Ontario as to other changes which had been refused, to the knowledge of the assured, altered an employer's liability policy which had been sent to him for delivery to the assured by making it comprehend the workmen at a place other than those named in the policy, and then handed it to the assured, who paid him the premium. He then sent the premium to the chief agent for Ontario, and advised him at the same time of the alteration made. The power to make any change in the policy did not rest in the local agents nor in the chief agent for Ontario, but only in the manager and attorney for Canada, who was not notified of the alteration:—*Held*, that the company could not be considered to have authorized the alteration and were not bound by the contract as altered. *Pigott* v. *Employers' Liability Assurance Corporation*, 20 Occ. N. 260, 31 O. R. 666.

III. Fire.

1. Co-insurance condition.] — Where the premium is reduced in consideration of the insertion in a policy of fire insurance, in the manner prescribed by the Ontario Insurance Act, R. S. O. c. 203, s. 169, of the condition commonly known as the "co-insurance condition," that condition is *prima facie* valid, and should not be held to be "not just and reasonable" within the meaning of s. 171 of the Act, without evidence to that effect: Burton, C.J.O., and Moss, J.A., dissenting.—Judgment in 29 O. R. 695, 18 Occ. N. 361, affirmed. *Eckardt* v. *Lancashire Insurance Co.*, 20 Occ. N. 297, 27 A. R. 373.

2. Condition—*Change material to risk —Non-occupancy.*]—Where by a condition in a fire policy on a dwelling house, any change material to the risk, etc., should avoid the policy, the fact of the premises being unoccupied and vacant does not constitute a breach of such condition. *Boardman* v. *North Waterloo Farmers' Mutual Fire Ins. Co.*, 20 Occ. N. 176, 31 O. R. 525.

3. Condition requiring occupation of premises — "*Untenanted*," *meaning of.*]—A condition in a policy of fire insurance that "if the premises insured become untenanted or vacant, and so remain for more than ten days without notifying the company," etc., "the policy will be void," is a reasonable condition, and the word "untenanted" therein must be read as synonymous with "unoccupied." Where therefore, the occupant of a house left it for several weeks, but left the furniture and clothing therein, while a person went there to feed the pigs and chickens and water the flowers, and on two occasions the insured's husband slept in the house, it was held that the house was untenanted and vacant within the meaning of the condition. *Spahr* v. *North Waterloo Farmers' Mutual Fire Ins. Co.*, 20 Occ. N. 177, 31 O. R. 525.

4. Proofs of loss—*Increase of risk—Appeal—Questions of fact.*] — A departmental store company, whose premises were destroyed by fire in 1897, had insurance on the stock amounting to $219,000, and actions were brought against five companies by a bank, as assignees of the claims by an assignment after the loss. The companies defended on the grounds of false and fraudulent statements in the proofs of loss; that the fire was caused by the act of the insured; that the risk was increased by overstocking and heavy insurance; and that the bank was not in law the assignee of the policies. The causes were tried without a jury, and resulted in a verdict for the bank, which was sustained by the Court of Appeal. On appeal to the Supreme Court of Canada:—*Held*, Gwynne, J., dissenting, that the appeal depended almost entirely on questions of fact, passed upon by two Courts, and for a second appellate Court to reverse the decisions would be going in the teeth of many former decisions; that on the question of law, that the proofs were defective, it being claimed that according to the evidence the accounts of stock were padded and the true value was much less than the insurance, the reasons given by the trial

Judges and Judges in appeal were conclusive; that the explanation of the discrepancy had been accepted by the trial Judges; and that, on the question of increase of risk, the Ontario Courts had adopted too narrow a construction in holding that such increase could only be effected by direct dealing with the property insured; but there was no increase in fact. *Quebec Fire Ins. Co.* v. *Bank of Toronto*, 20 Occ. N. 222.

5. Subsequent insurance — *Notice—Mortgagee.*]—A policy of insurance on a mortgaged property contained a condition that the insured should give notice of any other insurance already made, or which should afterwards be made elsewhere on the same property, whether valid or not valid, and whether concurrent or otherwise, so that a memorandum of such insurance might be indorsed on the policy. The mortgagee, without such notice or indorsement, effected another insurance with another company in the name of the plaintiff's wife, with the loss, if any, payable to himself as his interest might appear:—*Held*, that the mortgagee's insurance, without the notice and indorsement, voided the plaintiff's insurance. *Perry* v. *Liverpool and London and Globe Ins. Co.*, 34 N. B. Reps. 380.

6. Transfer of policy — *Defect.*]—The transfer of a policy of fire insurance to a mortgage creditor of the insured, as security for the debt of the latter, has no retroactive effect, and does not protect the transferee against defects and nullities in the policy existing prior to its transfer to and acceptance by him. So, where the insured had no valid title to the property insured, the transferee cannot recover.—2. The acceptance by the insurance company of a transfer of fire insurance, validates the transfer as a transfer, but does not create a new contract of insurance with the transferee. *Stanstead and Sherbrooke Mutual Fire Ins. Co.* v. *Gooley*, Q. R. 9 Q. B. 324.

See ATTACHMENT OF DEBTS, I. 7, 9—CONTRACT, III. 3.

IV. GUARANTEE.

Fidelity of servant—*Interim receipt—Conditions—Prosecution of servant.*]—The appellants effected an insurance with the respondents for the fidelity of certain of the appellants' employees, amongst whom was B. An interim receipt for the premium was given, in which it was stated that it was issued "subject to the conditions of the company's general form now in use for the class of risk." Before the expiration of the three months allowed for the issue of the policy under the conditions of the interim receipt, there was a shortage in B.'s accounts, for which the appellants made a claim under the contract of insurance. The respondents pleaded that by one of the conditions of their ordinary policy the insured was obliged to prosecute the defaulting employee to conviction with all diligence, and that, as this condition had not been complied with by the appellants, they coud not recover:—*Held*, affirming the judgment in Q. R. 16 S. C. 78, that the conditions of the respondents' ordinary form of policy for this class of risk must be included and read into the text and meaning of the interim receipt. The acceptance of the receipt in this form must be held to indicate either that the appellants knew what these particular conditions were, or had such a knowledge of the general conditions in use by guarantee companies, that they were willing to be bound by them. 2. It was not an unreasonable condition that the employer should, as a condition precedent, use all possible diligence to prosecute the defaulting employee to conviction. *Canada Life Assurance Co.* v. *London Guarantee and Accident Co.*, Q. R. 9 Q. B. 83.

V. LIFE—BENEFIT SOCIETY.

1. Beneficiary for value.]—Under ss. 151 and 160 of the Ontario Insurance Act, R. S. O. c. 203, it is not necessary, in the absence of a requirement therefor on the face of the policy, to find as a fact whether or not the beneficiary is one for value; but, apart from this, the evidence in this case shewed that the plaintiff, who claimed to be a beneficiary under such a policy, had no claim whatever thereunder. *Potts* v. *Potts*, 20 Occ. N. 179, 31 O. R. 452.

2. Certificate — *Forfeiture — Non-payment—Rules.*] — The defendants were an unincorporated union or society of workmen of a particular class, having their head office in a foreign country, with unincorporated branches or lodges in this Province :—*Held*, that beneficiary certificates issued by them to members, entitling members or their representatives, upon payment of certain assessments and compliance with certain conditions, to certain pecuniary benefits, were not subject to the provisions of s. 144 of the Ontario Insurance Act, 60 V. c. 36 :—*Held*, also, that, even if the Act did apply, a beneficiary certificate not containing an absolute contract to pay any sum, but stating merely that upon compliance with the conditions, and upon payment of the assessments, directed by the constitution, the sum authorized by the constitution

would be paid, and that any default would render the certificate void, was not within the section, and that the conditions of the constitution must be read into it in determining its validity. *Wintemute* v. *Brotherhood of Railroad Trainmen*, 20 Occ. N. 347, 27 A. R. 524.

3. Certificate—*Indorsement for benefit of wife—Subsequent revocation by will—By-laws of society.*]—A certificate of life insurance issued to a member by a benefit society stated on its face that it was subject to the provisions of the by-laws, rules, and regulations of the society. One of the by-laws provided for the payment of the insurance money to any person nominated by indorsement, which indorsement might be revoked. The member, by indorsement on the certificate, directed that all money accruing upon it should be paid to his wife upon his death; but, subsequently, by will directed that only a portion of it should be paid to her, and the balance to his half-brothers and sisters:—*Held*, that the insurance was subject to the provisions of the Ontario Insurance Act, R. S. O. c. 203; and the by-laws and rules of the benefit society, in so far as they were inconsistent with such provisions, were to be regarded as modified and controlled by them. The statute provided in effect that when the indorsement was in favour of the wife of the member, he could not revoke it, and the by-law was in this respect modified and controlled by the statute. *Mingeaud* v. *Packer*, 21 O. R. 267, 19 A. R. 290, applied and followed. *In re Harrison*, 20 Occ. N. 38, 31 O. R. 314.

4. Change of beneficiary — *Preferred class—Beneficiary for value—Premiums.*]—A person whose life was insured by a benevolent society in favour of his wife, a beneficiary for value, though not stated to be so in the certificate, was unable or unwilling to keep the insurance in force, and the later assessments before his death were paid by the wife. By his will the assured gave the whole of the insurance moneys to one of his sons:—*Held*, that he had power to do so by virtue of s. 160 of the Ontario Insurance Act, R. S. O. c. 203. The proviso at the end of s.-s. (2) shews that the section is applicable to the case of a beneficiary for value, and that those only who appear as such expressly on the policy are protected against the wide power to change beneficiaries conferred by the section. It was conceded that the wife should have a return of all moneys paid by her to keep the certificate in force, with interest. *Book* v. *Book*, 20 Occ. N. 386, 32 O. R. 206.

5. Increase of death benefit—*By-law.*]—Where a by-law of a mutual benefit society was passed, increasing the amount payable at death of members of the society, such by-law applies to those who were members at the time it was passed as well as to those who became members subsequently, more particularly where the new by-law was not accompanied by any change in the scale of weekly payments either by prior or subsequent members. *Lavigneur* v. *L'Union Mutuelle de Bienfaisance*, Q. R. 16 S. C. 588.

6. Non-payment of dues — *Forfeiture.*]—Upon the construction of the special rules of a benevolent society Burton, C. J. O., and Maclennan, J. A., held that a member had, in consequence of non-payment of dues by him, ceased to be a member and had forfeited his right to benefits, while Osler and Moss, JJ.A., took the contrary view. In the result, therefore, the judgment of Boyd, C., in the plaintiff's favour, was affirmed. But see 29 S. C. R. 397. *Hilliker* v. *Knights of the Maccabees*, 20 Occ. N. 2.

7. Widow — *Marriage contract—Child of former marriage.*]—The benefits accorded by a benefit society to the widow of one of its members, who was at liberty to dispose of such benefits by will, gift, or otherwise, and did not do so, are not incompatible with a clause in the marriage contract by which the wife renounced all matrimonial advantages; and the widow is entitled to such benefits to the exclusion of the children of the deceased, even where the latter, at the time he became a member of the society, was married to a former wife by whom he had children living at the time of his decease. *Dauphinais* v. *Bousquet*, 2 Q. P. R. 414.

VI. Life—Other Cases.

1. Beneficiary—*Murder of assured—Liability of insurers.*]—The fact that the beneficiary of a policy of life insurance has intended to assassinate, and has in fact assassinated, the assured, in order to obtain payment of the amount of the policy, is not sufficient—at any rate if it is not proved that the assured knew of this intention when he insured his life, nor that the beneficiary was his agent in effecting such insurance—to release the insurer from the obligation to pay the amount of the insurance to the heirs of the assured; the benefit stipulated for in favour of the assassin having been judicially declared void. *Trudeau* v. *Standard Life Insurance Co.*, Q. R. 16 S. C. 539.

2. Condition — *Pleading—Burden of proof—Waiver.*]—A life insurance policy contained a condition providing for payment in ninety days after satisfactory

proofs of death were furnished to the association; another that death from consumption and certain other diseases was not covered by the policy; and another setting out what proofs must be given. In an action on this policy the plaintiff alleged that she had furnished proof of the death of the insured on a certain date, and that all conditions were performed and all times elapsed to entitle her to payment. The defendants denied these allegations and put the plaintiff to strict proof thereof:—*Held*, that under the Ontario Judicature Act, differing in this respect from the practice in England, the plaintiff was bound to prove the truth of her above allegations; that giving of satisfactory proofs was a condition precedent to her right of action, performance of which she had to allege and prove; that no rule of law obliged the defendants to prove non-performance; that there was no evidence of waiver of proof as contended by the plaintiff; and that in any case the plaintiff could not recover, as the proofs given, taken in connection with the evidence, shewed the deceased to have died of consumption, which was not covered by the policy. Judgment of the Court of Appeal, 9th May, 1899, reversed. *Randall* v. *Home Life Association of Canada*, 20 Occ. N. 49, 30 S. C. R. 97.

3. Non-acceptance of policy—*Damages.*]—By an application for a policy of insurance on the defendant's life he bound himself to pay the first premium on the presentation of the policy; but it was also agreed that the company should not incur any liability until the premium had been actually paid and received by the company. The application was accepted by the company and a policy issued and tendered to the applicant, who refused to accept the same:—*Held*, that the company could not claim the whole amount of the premium as liquidated damages, but were entitled to such damages only as had been occasioned by the defendant's refusal to accept the policy. *Royal Victoria Life Ins. Co.* v. *Richards*, 20 Occ. N. 173, 31 O. R. 483.

4. Pleading — *Foreign law—Cause of death.*]—To the two counts of a declaration upon a policy or certificate of life insurance defendants pleaded 34 pleas. The 1st and 18th were alike and were as follows: "The defendants say that no demand of the said sum of $2,000 was made at the association's office in Galesburg, Illinois, and by reason thereof, and by the laws of the State of Illinois, the plaintiff cannot recover upon the said certificate." The 3rd and 20th pleas were also alike and were as follows: "The defendants say that the death of the said August P. B. LeBlanc was from a cause exempted by the provisions and agreements contained in the said certificate." An order was made in Chambers striking out these four pleas as being embarrassing. Upon a motion to rescind the order:—*Held*, that the 1st and 18th pleas were bad for not averring what the law of the State of Illinois was by reason of which the plaintiff could not recover; and (2) that the 3rd and 20th pleas were good—it being unnecessary to specify the particular cause relied upon by the defendants as exempting them from liability. *LeBlanc* v. *Covenant Mutual Benefit Association*, 34 N. B. Reps. 444.

5. Premium note—*Non-payment—Forfeiture — Extended insurance.*] — A life policy was issued on the 27th June, 1894, for $5,000, an annual premium of $84.50 being payable on the 20th March in each year. The second premium was paid on the 20th March, 1895, but the third was not paid, the insured giving a promissory note dated 20th March, 1896, at ninety days, the note providing that if it was not paid at maturity the policy should become null and void, but subject, on subsequent payment, to reinstatement under the rules for lapsed policies. Payments on account of the note were made, and in February, 1898, the insured died:—*Held*, in an action by the beneficiary, that the giving of the note was not a payment of the premium such as would entitle the insured to the extended insurance allowed in case three full annual premiums had been paid. *Tilley* v. *Confederation Life Association*, 20 Occ. N. 184, 7 Brit. Col. L. R. 144.

See ATTACHMENT OF DEBTS. I. 8—INTERPLEADER, 2—RECEIVER. 2.

VII. MARINE.

Policy on freight—*Constructive total loss—Frustration of object of voyage by peril insured against.*]—Plaintiff's steamer, while on a voyage from Halifax to Havana, with a cargo of fish and potatoes, was disabled by the breaking of her shaft, and was towed into Hamilton, Bermuda. It was found impossible to repair the ship in time to enable her to carry the cargo forward, and, at the request of the shippers, the cargo was returned to them and brought back to Halifax. The ship was sold and towed to Philadelphia, where she was repaired. Plaintiff brought action against the defendant company to recover the amount insured upon freight to be earned. The jury found, in answer to questions submitted to them, that the ship could not have been repaired at Bermuda in time to

have carried the cargo forward to Havana, without material deterioration of the cargo, or its becoming worthless, and that the shaft was broken by perils of the sea :—*Held*, that plaintiff was entitled to recover, the cargo being one that required to be carried forward to its destination without delay, and the object of the voyage having been wholly frustrated by a peril insured against :—*Held*, also, the venture having been made of no effect by a peril insured against, that there was a constructive total loss of the freight. *Musgrave* v. *Mannheim Insurance Co.*, 32 N. S. Reps. 405.

VIII. Plate Glass.

See Negligence, 2.

INTEREST.

See Assessment and Taxes, IV. 1—Bankruptcy and Insolvency, I. 2—Contract, I. 7—Costs, IX. 5—Judgment, V. 5 — Limitation of Actions, 8—Municipal Corporations, II. 3, IX. 1, XVI. 1—Partnership, IV. 3—Way, II. 2—Will, I. 1.

INTERIM ALIMONY.

See Husband and Wife, III. 2, 3, 4, 5.

INTERIM INJUNCTION.

See Injunction, I.

INTERPLEADER.

1. Issue—*Parties—Onus.*]—Where the proceeds of a life insurance policy were claimed by the widow of the assured and also by an assignee for value, and it appeared that the assured had first made a declaration in writing on the policy devoting all the benefit to his wife, and had subsequently by writing assumed to limit such benefit to $1, and had then made the assignment to the other claimant :—*Held*, that the latter should be plaintiff in an interpleader issue ordered to be tried between the claimants. *In re Hubbell*, 20 Occ. N. 389, 19 P. R. 240.

2. Summary application—*Insurance moneys—Adverse claims—Foreign claimants—Notice of motion—Service out of jurisdiction.*]—Certain moneys were payable by an insurance company under several life policies in favour of the assured, his executors, administrators, or assigns. The moneys were claimed by the executors, who resided in Manitoba, where the assured died, and who were threatening suit there, and also by the widow, who resided in Quebec, and had brought an action against the company there. The company's head office was in Ontario, and they launched an application in the High Court for a summary interpleader order :—*Held*, reversing the decision in 19 P. R. 16, 19 Occ. N. 313, that the company were entitled to avail themselves of the provisions of Rule 1103 (*a*), as persons under liability for a debt in respect of which they were, or expected to be, sued by two or more persons; and service out of Ontario of the company's notice of motion for the interpleader order was properly allowed under Rule 162 (3). *In re Confederation Life Association and Cordingly*, 20 Occ. N. 32, 19 P. R. 89.

3. Summary application—*Money in bank—Adverse claims—Foreign claimants—Jurisdiction.*]—A summary application under Rule 1103 (*a*) for an interpleader order in respect of certain moneys deposited with the defendants and claimed by the plaintiff by this action brought in Ontario, and also by an English corporation by an action brought in England, was dismissed:—*Held*, that the mere fact that an action was possible here because a branch office of the bank was in Toronto, was not enough to attract to this forum the extraordinary or special remedy by way of interpleader, as against the English corporations; and a salutary discretion was exercised in refusing the application. *Harris* v. *Bank of British North America*, 20 Occ. N. 15, 38; 19 P. R. 51.

See Sheriff, 1.

INTERROGATORIES.

See Discovery, II.

INTERVENTION.

Dismissal for non-prosecution.]—If the intervening party, after having declared his intention to intervene, does not cause his intervention to be received by the Judge, it will be dismissed for want of prosecution, as in the case of a

writ not returned. *Nadon* v. *Richmond, Drummond, and Yamaska Mutual Ins. Co.*, 3 Q. P. R. 306.

See MUNICIPAL ELECTIONS, I. 1, 9—PARTIES, III. 2—SOLICITOR, III.

INTOXICATING LIQUORS.

Drunkard—*Allowance to family—Estate—Principal.*] — Where the estate of a drunkard did not yield sufficient income to maintain him and to partly maintain his family, the Court, under 53 V. c. 4, s. 276, ordered a yearly sum to be paid out of principal by the drunkard's committee to the family for their support. *In re Stackhouse*, 2 N. B. Eq. Reps. 91.

See CANADA TEMPERANCE ACT—LIQUOR LICENSE ACT.

INVENTION.

See PATENT FOR INVENTION.

INVENTORY.

See BENEFICE D'INVENTAIRE — EXECUTORS AND ADMINISTRATORS, 1—HUSBAND AND WIFE, V. 1.

ISSUE.

See INTERPLEADER, 1.

JOINTURE.

See DOWER, 3.

JUDGMENT.

I. BY DEFAULT.
II. FOREIGN JUDGMENT.
III. OPENING UP, RESCINDING, AND VARYING.
IV. SUMMARY JUDGMENT.
V. OTHER CASES.

See APPEAL, V. 3, VI. 1, IX. 8, X. 2, 5—ATTACHMENT OF DEBTS, II. 8—COSTS, IX. 4—EXECUTION — EXECUTORS AND ADMINISTRATORS, 4 — HUSBAND AND WIFE, VIII. 6 — LIMITATION OF ACTIONS, 3, 4—NEW TRIAL, 2—PARTNERSHIP, IV. 3—PEREMPTION, 8—PROHIBITION, I. 2, II. 1—REGISTRY LAWS, I. 1—REVIVOR, 1—SALE OF GOODS, VI. 2—STAY OF PROCEEDINGS, 4—TRIAL, X.—WRIT OF SUMMONS, V. 4.

I. BY DEFAULT.

1. Action on bond — *Writ of summons—Special indorsement — Statement of claim—Service by posting—Motion for judgment—Assessment of damages.*]—An action against the sureties in an appeal bond to recover the plaintiffs' costs of an appeal is in the nature of a claim for damages requiring assessment (see Rule 580), and a special indorsement of the writ of summons is inappropriate, and a judgment for default of appearance or default of defence is a nullity, not curable by delay or acquiescence. The defendants in this case not having appeared, the plaintiffs filed and posted up copies of a statement of claim, without filing the writ of summons and affidavit of service:—*Held*, that the posting of the statement could not, having regard to Rule 574, be treated as a service upon the defendants. But, even if it could be so treated, a motion for judgment thereon and an assessment of damages would be necessary. *Star Life Assurance Society* v. *Southgate*, 18 P. R. 151, 18 Occ. N. 229, followed. Leave to appeal refused. *Appleby* v. *Turner*, 20 Occ. N. 209, 253, 19 P. R. 145, 175.

2. Ex parte application — *Default note — Motion to set aside judgment — Costs.*] — A statement of defence filed after the pleadings have been noted as closed for default of defence under Rule 263, is irregular, but not a nullity, and should be regarded as evidence of an intention to defend; and where, as now permitted by Rule 586, a motion for judgment upon the statement of claim is made *ex parte*, and the fact of the defence having been filed is brought to the knowledge of the Judge, he should direct notice to be served in order to give the defendant an opportunity to make his defence regular. In this case judgment having been granted *ex parte*, it was ordered that there should be no costs of the defendant's motion for relief under Rule 358, which was granted. *Jackson* v. *Gardiner*, 20 Occ. N. 177, 19 P. R. 137.

3. Service of writ of summons—Company — Abuse of process of Court—Right of parties interested to intervene.]—The plaintiff obtained judgment by default in an action against the defendant company, of which he was president. The writ in the action was served upon the plaintiff only, and there was no other service upon, or notice of the pendency of the action, given to anyone connected with the company or concerned in its affairs. The judgment having been set aside at the instance of the respondents, who were trustees for the bondholders of the company, and had recovered judgment against the company for a large amount:—*Held*, that the

mode of service was one that could not be adopted, and that it should be set aside as an abuse of the process of the Court. *Per* Weatherbe, J., dissenting, that, as plaintiff's judgment was one which could not be set off against respondents' claim, they were not prejudiced by it and should not be allowed to set it aside. *Holmes* v. *Stewiacke R. W. Co.*, 32 N. S. Reps. 395.

4. Undertaking to appear—*Failure to appear — Setting aside — Costs.*]—The defendant's solicitor accepted service of process and undertook to enter an appearance, which he failed through inadvertence to do, and afterwards advised the plaintiff's solicitor, and requested him to have the interlocutory judgment signed for default set aside by consent, and allow the defendant to defend:—*Held*, that, when a solicitor accepts service and undertakes to appear and does not, the only course is to proceed against him by attachment; nothing short of personal service will justify entering judgment. *Rice* v. *Stewart*, 20 Occ. N. 414.

See COSTS, IX. 10.

II. FOREIGN JUDGMENT.

1. Action on — *Defence—Illegality.*]—The defendant cannot plead that the plaintiff's claim is based upon a contract forbidden by law and contrary to public policy and good morals, when the claim is upon a judgment recovered in another Province of Canada, if the defendant has appeared and pleaded in the original action. *McCurry* v. *Reid*, 3 Q. P. R. 165.

2. Action on, in Ontario — *Defence available in foreign Court—Principal and surety—Limitation of actions—Statement of claim—Writ of summons—"Absence beyond seas" — Foreigner.*]—A creditor who has obtained judgment in a foreign country for the amount of his debt, may, if entitled to sue at all in this Province, sue either upon the foreign judgment or upon the original consideration. An action upon a foreign judgment may fail if it be proved that the judgment is of such a nature that it would upon the application of the defendant be set aside in the Court in which it was recovered. By the indorsement of his writ the plaintiff claimed upon the foreign judgment only, but in his statement of claim he set up an alternative claim upon the original consideration. a promissory note:—*Held*, that it was too late to object to this at the trial, and that, as the period of limitation had not expired at the time of the issue of the writ, the plaintiff was entitled to recover, although that period had expired before the filing and delivery of the statement of claim:—*Held*, also, that, even if the action were treated as having been brought at the time of the filing and delivery of the statement of claim, the defence of the Statute of Limitations was of no avail, because the defendant, a foreigner, had never been within the Province, and the statute had therefore never commenced to run in his favour. In an action against the maker of a promissory note it was alleged that he was a surety, and it was shewn that by the law of the state in which the note was given a creditor could not recover against a surety without first endeavouring by legal process to recover against the principal:—*Held*, that the defence of suretyship was not made out; but *semble*, that such a defence would be a matter of procedure only, and no bar to an action in this Province. *Bugbee* v. *Clergue*, 20 Occ. N. 57, 27 A. R. 96.

3. Divorce and alimony—*Domicil—Jurisdiction — Production of record—Presumption—Rebuttal—Lands in Ontario.*]—In an action on a judgment of a foreign state, granting a husband a divorce and a wife a sum of money as alimony, it was contended by the husband that, as he had never acquired the necessary domicil to give the foreign Court jurisdiction to grant the divorce, the judgment was invalid:—*Held*, that, as he had invoked and submitted to the jurisdiction of the foreign Court, he had precluded himself from setting up any want of jurisdiction:—*Held*, however, were this not so, that, in the absence of anything appearing on the face of the foreign proceedings to shew want of jurisdiction, the production of the record was *prima facie* evidence entitling the plaintiff to recover; and, although the presumption in favour of the judgment may be rebutted, clear proof of facts to shew want of jurisdiction must be adduced:—*Held*, also, that the wife was entitled to judgment for payment of the alimony although the amount was arrived at upon a consideration of the value of the lands of the husband in Ontario. *Semble*, that, had the foreign judgment provided for the division in specie of the husband's property in Ontario, it would not have been invalid. Judgment in 19 Occ. N. 281, 31 O. R. 81, reversed. *Swaizie* v. *Swaizie*, 20 Occ. N. 33, 31 O. R. 324.

4. Res judicata — *Arrest in foreign country—Action for — Malice.*]—A foreign judgment is not *chose jugée* before our Courts; and the discussion can be reopened on the matters which formed the basis of that judgment. 2. A person

may be arrested in the State of Vermont for debt contracted in this Province, according to the law of that State, without it giving rise to an action for damages against the party causing such arrest, provided it be done without fraud or malice. *Rice* v. *Holmes*, Q. R. 16 S. C. 492.

III. OPENING UP, RESCINDING, AND VARYING.

1. Modification — *Alimentary allowance—Reduction—Petition — New action.*]—One who has been condemned to pay an alimentary allowance cannot, upon a simple petition filed in the original cause, ask to be relieved from the payment on account of a change in his means (Art. 170, C. C.), but he must, if he wishes to have the judgment modified, proceed by writ of summons in the ordinary form. *Noreau* v. *Bocquet*, Q. R. 17 S. C. 77; *Pelletier* v. *Jutras*, *ib.* 79. *Sed vide Delisle* v. *Pillet*, *ib.* 75 (*ante* **INFANT**).

2. Non-service of process — *False return—Opposition — Merits.*]—The defendant may, in an opposition to a judgment rendered against him by default, allege reasons based upon the default of service of the process in the action and the falsity of the bailiff's return, and reasons based upon the invalidity of the plaintiff's claim; and an inscription in law against the opposition based on the ground that such reasons cannot be invoked at the same time, will be dismissed.—2. A defendant who has not been served with a writ cannot be debarred from demanding the setting aside of a judgment rendered against him, and that, although he may have no good plea to the action. *Marion* v. *Leroux*, 2 Q. P. R. 557.

3. Petition—*Alimentary allowance.*]—The rescission or revocation of a final judgment granting an alimentary allowance cannot be obtained upon summary petition. *Roach* v. *Morahan*, Q. R. 17 S. C. 372, 3 Q. P. R. 141.

4. Petition — *Discovery of fresh evidence — False swearing — Delay.*] — The plaintiff claimed against his father, the defendant, five-twelfths of a parcel of land which he said had belonged to his deceased mother, but, on default of proof of the ownership of the mother, and the defendant having sworn that he had the land from certain persons to take care of, paying the taxes, his action was finally dismissed by the Supreme Court of Canada on the 1st May, 1897. On the 11th May, 1897, the plaintiff discovered two documents: one, a deed of sale of the 25th November, 1867, whereby his mother had acquired the land, the defendant having signed the deed to authorize his wife: the other, a report of experts dated the 30th March, 1868, by virtue of which a builder's privilege had been registered against the land as the property of the mother. The defendant moved against the judgment of the Supreme Court by a petition which was to have been presented to a Judge of the Superior Court on the 25th October, 1897, but which was adjourned to a later date by agreement between the solicitors. The petition was presented on the 3rd November, but the Judge having granted an enlargement to the defendant to allow him to file an answer in writing, it was not received until the 3rd December, 1897:—*Held*, that the discovery of these documents, added to the fact that the defendant, who must have known of them, had sworn falsely in affirming that he had himself acquired the land, was a good ground for the petition and justified the opening up of the judgment. 2. That, as the reception by the Judge of the petition referred back to the date of its presentation, delay could not be urged against the applicant. *Durocher* v. *Durocher*, Q. R. 16 S. C. 370.

5. Petition—*Documents since produced — Peremption.*] — Letters or documents addressed to the attorneys of the plaintiffs and in their possession at the time when a demand for peremption is made, if not produced at the time when the demand is contested, cannot after judgment thereon afford ground for a petition to set aside such judgment. *Durocher* v. *Bilodeau*, Q. R. 17 S. C. 119.

6. Procedure—*Opposition.*]—A defendant who has had judgment entered against him *ex parte* after default regularly noted cannot proceed by way of *requête civile* to have the judgment rescinded, but must apply by way of opposition to the judgment. *Cantin* v. *Braham*, Q. R. 16 S. C. 225.

See PLEADING, IV.—RES JUDICATA. 1.

IV. SUMMARY JUDGMENT.

1. Dismissal of action—*Admissions.*]—The Court or a Judge has power, in a proper case, to dismiss the action on an application under Rule 616. In an action to recover a debt alleged to have been due by the defendant to the plaintiff's deceased father, the claim for which was assigned to the plaintiff by her mother, as administratrix of the father's estate, the plaintiff, on being examined for discovery, admitted that

she had no personal knowledge on which she could succeed, but was relying upon an entry made in a book of her father, that he had lent the defendant money on a certain day:—*Held*, that she could not be obliged to tell what evidence she was going to use nor what witnesses she meant to call; she could have been asked if she had disclosed her whole case; but, not having been asked that, it was open for her to say that she had evidence of facts outside of those within her own knowledge which might tend to establish her case; and the action should not be dismissed. *Coyle* v. *Coyle*, 20 Occ. N. 76, 19 P. R. 97.

2. Mortgage—*Immediate possession — Recovery of land.*]—A writ of summons was indorsed, under Rule 141, with claims for foreclosure of a mortgage, for immediate delivery of possession of the mortgaged premises, and for immediate payment of the mortgage money:—*Held*, that it could not be said to be specially indorsed under Rule 138 so as to entitle the plaintiffs to move under Rule 603 for summary judgment for recovery of land. *Supreme Court of the Independent Order of Foresters* v. *Pegg*, 20 Occ. N. 32, 19 P. R. 80.

3. Recovery of land—*Money claim—Counterclaim — Trial.*] — The defendant having entered into possession of land which he had contracted to purchase from the plaintiffs, and having, as alleged, made default in payment of instalments of the purchase money, the plaintiffs brought an action against him to recover possession of the land and also for a money demand. The writ of summons being specially indorsed, and the plaintiffs having moved for summary judgment under Rule 603, the defendant set up that he had been induced to enter into the contract by fraud and misrepresentation, for which he intended to counterclaim, and that nothing was due to the plaintiffs in respect of their money demand. The Master ordered judgment for the recovery of the land, but stayed the operation of it until after judgment upon the plaintiffs' other claim and the defendant's counterclaim, which he allowed to go to trial:—*Held*, reversing this order, that many serious questions might arise at the trial as to the recovery of the land and the terms upon which it might be recovered, and the trial Judge ought not to be hampered with a final judgment for the recovery of the land in adjudicating upon the questions likely to arise upon the trial of the action. *Spears* v. *Fleming*, 20 Occ. N. 122, 19 P. R. 127.

4. Writ of summons—*Special indorsement.*]—The particulars of the plaintiffs' claim indorsed on the writ of summons were: — "1899. November 30. To balance of account rendered, which balance has been stated, $51.70. To balance of account rendered and stated owing to Hunter Brothers, and duly assigned for value by assignment dated the 1st day of December, 1899, to the plaintiffs, and of which express notice in writing has been given to the defendant, $167.15; $218.85." *Held*, not a special indorsement such as would support a summary judgment under Order XIV. *Rogers* v. *Reed*, 20 Occ. N. 219, 7 Brit. Col. L. R. 139.

V. Other Cases.

1. Abandonment — *Powers of solicitor.*]—The attorney *ad litem* has authority to abandon a judgment homologating the report of an expert accountant, which is a mere incident in the procedure. *Stephens* v. *Higgins*, 3 Q. P. R. 155.

2. Assignment—*Fraud—Equities—Notice.*]—The assignee of a judgment, void as against creditors under 13 Eliz. c. 5, takes the judgment subject to the rights of the creditors, notwithstanding the assignment is for value; and, *per* Rouleau and McGuire, JJ., without notice: *per* Wetmore, J., at all events, with notice. *Totten* v. *Douglas*, 16 Gr. 243, 18 Gr. 341, discussed. *Shorey* v. *Stobart*, 1 Terr. L. R. 262.

3. Confession — *Invalidity.*]—A confession of judgment signed by the attorney, and not by the party, is void as such, but is valid as an admission that the defendant owes the amount which he has confessed. *Thurston* v. *Hughes*, Q. R. 16 S. C. 472.

4. Delivery — *When delivered.*]—*Held*, that a judgment signed by the Judge and left by him for deposit in the mail at Victoria on the 11th August, 1899, was pronounced on that date, although the judgment did not apparently reach the Vancouver Registry, to which it was addressed, until the 15th. *Attorney-General* v. *Dunlop*, 20 Occ. N. 395, 7 Brit. Col. L. R. 312.

5. Interest — *Verdict.*]—The plaintiff obtained a verdict at the trial, but the trial Judge dismissed the action. The Court *en banc* allowed an appeal by the plaintiff and ordered that judgment be entered for the amount of the verdict:—*Held*, that the plaintiff was entitled to interest from the date of the verdict. *Gordon* v. *City of Victoria*, 7 Brit. Col. L. R. 339.

6. Interlocutory judgment—*Assessment of damages—Slander.*]—The action

was commenced by writ of summons indorsed—"The plaintiff's claim is for damages for slander." No appearance having been entered, the plaintiff signed interlocutory judgment against the defendant according to form 146, and set the cause down for assessment of damages at a sittings of the High Court:—*Held*, that there being nothing to shew that the action was brought under R. S. O. c. 68, s. 5, it must be treated as an ordinary action of slander; Rule 578 therefore applied to the case; the delivery of a statement of claim was unnecessary; and the plaintiff had no right to sign interlocutory judgment and have the damages assessed as he proposed. Origin of Rule 578. *Stanley* v. *Litt*, 20 Occ. N. 64, 19 P. R. 101.

7. Opposition—*Admissions.*]—A plaintiff has a right, in answer to an opposition to judgment, to allege admissions of liability made by the defendant subsequently to the institution of the action, on the production of the opposition, and such allegations will not be rejected on motion. *Marion* v. *Leroux*, 2 Q. P. R. 564.

8. Prothonotary—*Irregularity.*] — A judgment rendered by the prothonotary in an action for wages is valid on its face, although it appears to have been rendered by the Judge. *United Counties R. W. Co.* v. *Letendre*, 3 Q. P. R. 295.

9. Transcript — *County Courts Act—Real Property Limitation Act.*] — *Held*, that s. 24 of the Real Property Limitation Act, R. S. M. c. 89, applies to any judgment whether charged on land or not, and that no proceedings can be taken to enforce a judgment after the lapse of ten years from the date of its recovery. That the filing in 1892 of a transcript of a County Court judgment in the Queen's Bench, under s. 193 of the County Courts Act, R. S. M. c. 33, since repealed, had not so far the effect of making the same a new judgment as to give a new point of time for the running of the statute. *Jay* v. *Johnstone*, [1893] 1 Q. B. 25, and *McKenzie* v. *Fletcher*, 11 Man. L. R. 544, followed. *Blanchard* v. *Muir*, 20 Occ. N. 140, 13 Man. L. R. 8.

JUDGMENT DEBTOR.

Examination—*Refusal to attend—Contempt of Court.*]—A defendant who has been duly summoned under Art. 590, C. C. P., upon a writ valid in form, for examination as to his property and assets, and who has made default to appear on the day fixed, is not entitled to be heard by counsel on the rule issued for contempt, or to ask for security for costs of contestation of the rule, until he have first obeyed the writ. *Galt Knitting Co.* v. *Coté*, Q. R. 16 S. C. 425.

See MANDAMUS, 1—PROHIBITION, II. 2.

JURISDICTION.

1. Exception to — *Cause of action—Property of defendants.*]—Where the cause of action arose out of the Province of Quebec and the defendants had no residence or principal office in that Province, but had certain goods therein in the hands of an agent for sale on commission:—*Held*, that such goods were property within the meaning of Art. 94 (4), C. P.; and an exception to the jurisdiction was dismissed. *Lumsden* v. *Cowan*, 3 Q. P. R. 155.

2. Exception to—*Time—Prejudice.*]—An *exception déclinatoire* filed within the time allowed by Art. 164, C. C. P., but of which notice has been given for a date beyond the three days after the entry of the cause, will be maintained, if it causes no prejudice to the other party. *Price* v. *Fournier*, Q. R. 17 S. C. 333, 3 Q. P. R. 73.

See APPEAL — COMPANY, II. 2—CONTRACT, II. 2—COUNTY COURT JUDGE—COURTS—DOMICIL—INTERPLEADER, 2, 3—JUDGMENT, II. 3 — LANDLORD AND TENANT, II. 5 — LOCAL JUDGES AND MASTERS, 1, 2—PLEADING, V. 1— PROHIBITION, IV. 1—REVENUE, I. 1—SHIP. 7—SPECIFIC PERFORMANCE, 1—WATER AND WATERCOURSES, I. 1 — WRIT OF SUMMONS, IV.

JURORS.

See TRIAL, IV. 2.

JURY.

See TRIAL, IV.

JURY NOTICE.

See TRIAL, V.

JUSTICE OF THE PEACE—JURISDICTION OF.

1. Conviction for assault—*Summary trial—Consent—Amendment — Costs—Hard labour—"Forfeit and pay."*]—A conviction must shew the jurisdiction of the magistrate; but where a conviction for an

aggravated assault did not recite the consent of the accused, which was actually given, to be tried summarily, the defect was held to be covered by s. 800 of the Code. In such a conviction the magistrate has authority to award costs under s. 788 of the Code. And to sentence to imprisonment with hard labour in default of payment of fine and costs. The conviction, however, was bad because it did not adjudge that the accused should *forfeit* as well as pay the fine imposed. *Regina* v. *Cyr*, 12 P. R. 24, followed. *Regina* v. *Burtress*, 20 Occ. N. 368.

2. Conviction for obstructing peace officer—*Summary trial.*]—When a person is charged before a magistrate or two justices of the peace with resisting and obstructing a peace officer in the lawful performance of his duty, the magistrate or justices should observe the directions of s. 786 of the Criminal Code, and obtain the consent of the accused before proceeding to try the case summarily, notwithstanding the provisions of s. 144. Such offence is practically the same as is referred to in s. 783 (*e*), and the charge can only be heard in a summary way subject to the provisions of s. 786. *Regina* v. *Crossen*, 19 Occ. N. 347, 12 Man. L. R. 571.

3. Conviction — *Municipal by-law — Publication—Appeal — Certiorari.*] — Inasmuch as, by Art. 4061, R. S. Q., an appeal lies to the Superior Court from any conviction or order made by justices of the peace in prosecutions under the provisions of by-laws of a town council, and inasmuch as, by Art. 4615, no judgment, decision, or conviction, so susceptible of appeal, can be removed by *certiorari* to the Superior or Circuit Court, the remedy by *certiorari* is not competent to a person who complains of a decision by a justice of the peace under a by-law enacted by a town council with reference to a matter within its jurisdiction. 2. Where a by-law of a council has never been set aside or attacked, the question of its valid publication cannot be raised on an application for a writ of *certiorari*. *Hart* v. *Dunlop*, Q. R. 17 S. C. 383.

4. Warrant to arrest—*Discretion—Mandamus.*]—A magistrate has a discretion to exercise as to the issue of warrants of arrest, and if, after hearing and considering the allegations of the complainant and the evidence, he refuses to issue a warrant for the apprehension of the person accused, a writ of *mandamus* will not lie to compel him to do so. *Thompson* v. *Desnoyers*, Q. R. 16 S. C. 253.

5. Warrant to arrest—*School taxes —Irregularity—Demand—Trespass to person.*]—In an action for wrongful arrest and imprisonment, it appeared that the plaintiff was arrested and conveyed to gaol upon a warrant issued by the defendant, a justice of the peace, for the collection of $4.20, being three years' poll tax at $1 for each year, and an amount due for costs incurred on a general distress warrant previously issued by the defendant for the collection of the taxes, to which a return had been made by the constable that he was unable to find any goods whereon to levy. Before he issued the warrant under which plaintiff was arrested, defendant had before him the affidavit of the secretary of school trustees for the district, shewing that he had not paid his tax for three years, and that the trustees had authorized the secretary to collect the amount. The jury found that defendant acted in good faith in all that he did, and in the belief that all he did was authorized by the statute, and that he was required by the statute to do what he did:—*Held*, that defendant, having jurisdiction over the subject-matter brought before him, and over the person of plaintiff in respect thereto, was not liable in trespass, either by reason of his having issued the warrant for arrest without proof of a previous demand made upon plaintiff for payment of his tax, or by reason of a departure from the prescribed form of warrant; that defendant did not do any act which he had not power and jurisdiction to do upon a proper case; the most that could be said being, that he proceeded in an irregular way; that excess of jurisdiction does not extend to a mere irregularity, or erroneous judgment, but to a case where the justice does an act which he has no jurisdiction to do; that defendant's entry upon the inquiry was clearly within his duty and his jurisdiction; that under the Nova Scotia statutes the duty of inquiring into the validity of the rate is not imposed upon the justice. *Parker* v. *Etter*, 33 N. S. Reps. 52.

See APPEAL, V. 1—LIQUOR LICENSE ACT—PROHIBITION, III.

JUS TERTII.

See MASTER AND SERVANT, III.

LACHES.

See ACCOUNT, 2—ACTION, 4 — ASSESSMENT AND TAXES, VI. 2—BAIL—EXECUTION, III. 11 — FRAUDULENT CONVEYANCE, 2, 5—JUDGMENT, III. 5 — LIMITATION OF ACTIONS, 7 — PROHIBITION, I. 2—SOLICITOR, V. 2 —SPECIFIC PERFORMANCE, 2—STAY OF PROCEEDINGS, 4.

LAND REGISTRY ACT, B. C.

See REGISTRY LAWS, I.

LAND TITLES ACT, N.-W. T.

See REGISTRY LAWS, III. 1, 2.

LANDLORD AND TENANT.

I. DAMAGE TO TENANT'S GOODS.
II. DISTRESS FOR RENT.
III. LEASE—AGREEMENT FOR.
IV. LEASE — ASSIGNMENT AND SUB-LEASE.
V. LEASE—CANCELLATION OF.
VI. LEASE—RENEWAL OF.
VII. LEASE—SURRENDER OF.
VIII. LEASE—TERMINATION OF, AND NOTICE TO QUIT.
IX. LEASE—OTHER CASES.
X. OVERHOLDING TENANTS ACT.
XI. RENT.

See SPECIFIC PERFORMANCE, 2—TENANT FOR LIFE—USE AND OCCUPATION.

I. DAMAGE TO TENANT'S GOODS.

Fault of another tenant.] — The owner of a house is not responsible for the damage which the tenant of the cellar suffers by reason of the infiltration of water escaped from a supply pipe broken by the fault of the tenant of the storey above the cellar, these damages resulting from a plain invasion of the enjoyment of the tenant of the cellar, which makes Art. 1616, C. C., applicable. *Beaulieu* v. *Beaudry*, Q. R. 16 S. C. 475.

II. DISTRESS FOR RENT.

1. Claimant of goods seized—*Formal defects in seizure—Purchase of goods from tenant.*]—The plaintiff, being the defendant's landlord, seized under a writ of *saisie-gagerie* goods which the defendant had removed from the demised premises. These goods were claimed by an intervenant:—*Held*, that he could not rely upon defects of form which the defendant had neglected to invoke within the time allowed; if the seizure was regular as against the defendant, it must be held regular as against the intervenant. — 2. The intervenant, the purchaser from the defendant of the goods seized, took subject to the superior rights of the landlord; the tenant could not by selling the goods deprive the landlord of the privilege acquired before the sale. *Wilson* v. *McAvoy*, 2 Q. P. R. 440.

2. Exemptions — *Goods of lodger — Notice.*]—Goods declared exempt by law belonging to a person who lives with the tenant of a house cannot be seized for the rent by the landlord, with those of the tenant, the latter having by his lease renounced the privilege conferred by law as to exemptions from seizure. —2. A notice to the landlord in such case is not necessary; it is necessary only in a case where the lodger has upon the premises goods which are not exempt. *Nolin* v. *Ratté*, Q. R. 17 S. C. 182.

3. Exemptions — *Machine.*]—A machine which a workman keeps habitually going as a means of gaining his livelihood, is exempt from seizure under distress for rent, according to Art. 598, para. 10, C. P. *Thurston* v. *Hughes*, Q. R. 16 S. C. 472.

4. Exemptions — *Renunciation—Office furniture.*] — The defendant rented an office from the plaintiffs and in doing so renounced the exemptions from seizure which the law establishes in favour of the debtor. The plaintiffs, having made a seizure for rent due upon the furniture in the office of the defendant, he pleaded that these effects were exempt from seizure by virtue of Art. 598, C. P. C.:—*Held*, that, although, from motives of humanity, when the bedding, clothing, and food of the debtor and his family are in question, there is ground for coming to his relief and freeing him from the improvident renunciation which he has made of the privilege accorded him by Art. 598, these motives do not apply to the case of the furniture, more or less luxurious, of an office, the exemption from seizure existing thus only in the purely private interest of the debtor. *New York Life Ins. Co.* v. *Garceau*, Q. R. 16 S. C. 247.

5. Expired lease—*Renewal—Sufficiency of goods—Pleading—Jurisdiction—Superior Court.*]—The landlord's privilege in respect of goods upon the demised premises may be exercised even in respect of rent due by virtue of a lease which has expired. — The allegation that the defendant has sufficient goods is an allegation of fact, which may not be pleaded in a defence in law, even if the declaration does not contain an allegation to the contrary. — Want of jurisdiction cannot be set up by way of defence in law.—The Superior Court has jurisdiction to adjudicate upon the validity of a distress and eviction for $110 of rent due by virtue of two leases, one of which has expired, and $30 of

rent to fall due. *Leclaire* v. *Beauchamp*, 3 Q. P. R. 312.

6. Payment in kind — *Act of bailiff.*] — A distress for rent may lawfully be made where the tenant makes default under a lease providing that, in lieu of a money payment, he is to deliver to the landlord all the wheat grown upon the premises as soon as it should be threshed, and that the landlord should sell it and retain one-half the proceeds for himself and pay over the balance to the tenant. *Thompson* v. *Marsh*, 2 O. S. 389, and *Nowery* v. *Connolly*, 29 U. C. R. 39, followed. The distress in this case was made more than six months after, but under a warrant given to the bailiff four weeks before, the expiration of the tenancy, and there was no direct evidence that the landlord was aware of the illegal act of his bailiff in seizing at the time he did; but he learned of the fact of seizure after it had been made and before the sale, which he allowed to go on without making any inquiry, so far as the evidence shewed, and afterwards accepted the proceeds of the sale. *Held*, that the proper finding of fact was that the landlord either ratified the bailiff's illegal act with knowledge of the circumstances, or meant to take upon himself without inquiry the risk of any irregularity the bailiff might have committed, and to adopt all the bailiff's acts: and, following *Lewis* v. *Read*, 13 M. & W. 834, that the landlord was liable for the damages suffered by the tenant. *Dick* v. *Winkler*, 19 Occ. N. 330, 12 Man. L. R. 624.

7. Promissory note for rent—*Suspension of remedy — Accommodation—Burden of proof.*]—Where a promissory note was given and accepted for rent due:—*Held*, that the landlord's remedy by distress was suspended during the currency of the note. *Per* Meagher, J., that the burden of shewing that the note was given for his accommodation, and not for the rent, was upon the defendant by whom the defence was set up. *Colpitts* v. *McCullough*, 32 N. S. Reps. 502.

8. Removal of goods—*Fraud—Illegal distress—Pretended sale—Title to goods—Counterclaim — New trial.*]—A landlord is not justified in distraining goods which had been removed off the demised premises before the rent accrued due, though had the rent been due the removal would have been fraudulent; and the tenant is not precluded from setting up his title to the goods because of a pretended sale of them, the effect of which was to vest the possession, but not the property in the goods, in the alleged purchaser. — To an action for illegal distress brought in a County Court the defendant counterclaimed for rent due, but such counterclaim not having been tried, the action was remitted back to the County Court, to be there dealt with, and regard there to be had to the finding of this Court upon the rights of the parties. *Whitelock* v. *Cook*, 20 Occ. N. 171, 31 O. R. 463.

9. Supply of power and light—*Price — Remedy.*] — *Semble*, that when a room in a factory is let, with supply of necessary power and light, the landlord's privilege does not exist as regards the price of this supply. *Thurston* v. *Hughes*, Q. R. 16 S. C. 472.

See EXECUTION, III. 14.

III. LEASE—AGREEMENT FOR.

Covenant — *Taxes—Evidence—Discretion—Referee.*]—Upon a reference to settle the form of a lease, under a contract by a municipal corporation to demise land owned by it to a railway company for a long term of years with perpetual right of renewal, evidence of surrounding circumstances and the practice and usage of conveyancers is admissible to enable the Referee to decide whether the lease should contain a covenant by the lessee to pay municipal taxes. Upon such a reference the Referee is entitled to exercise a judicial discretion as to the evidence to be admitted, and he should not be ordered to admit, subject to objection, all evidence which may be tendered. *In re Canadian Pacific R. W. Co. and City of Toronto*, 20 Occ. N. 58, 27 A. R. 54.

IV. LEASE — ASSIGNMENT AND SUB-LEASE.

1. Assignment without leave—*Forfeiture—Election — New lease — Waiver — Distress — Acceleration — Assignment for benefit of creditors—Notice.*]—A lease of a store was made for five years, at a yearly rental, payable by even portions quarterly in advance, with the covenant that the lessee should not assign or sublet without leave, and with a proviso that if the lessee should make an assignment for the benefit of creditors, the then current and the next quarter's rent and the taxes for the then current year should immediately become due and payable as rent in arrear and be recoverable by distress or otherwise. During the term, the lessee made an assignment for the benefit of his creditors to the plaintiff, who sold the stock of goods in the store to the defendant. By the terms of the sale the defendant was to assume the rent and taxes and to arrange with the landlord of the premises

as to tenancy. The defendant's husband went into possession of the store and of the stock of goods, which had remained therein, and continued thereafter in possession of the store. On the 5th April, 1898, the lessors distrained the goods of the defendant in the store for $644, made up of $175 rent due on the 1st October, 1897, $175 rent due on the 1st January, 1898, $175 "the next quarter's rent," by virtue of the proviso in the lease, and $119 for the taxes for 1898, in respect of which sums they claimed to be preferred creditors on the estate of the lessee. The plaintiff paid the claim and costs under protest, and brought an action against the lessees to recover back $319.32 of it, which action was dismissed. On the 17th December, 1898, the lessors made a lease of the store to the defendant's husband to hold for three years from the 14th February, 1898. The lessors never consented in writing to the assignment of the demised premises to the plaintiff, and the plaintiff never assigned the premises to the defendant, and the lessors never recognized as rightful the occupation of the premises by the defendant. The plaintiff did not give notice to the lessors, under R. S. O. c. 170, s. 34, s.-s. 2, electing to retain the store for the unexpired term, or any portion of it:—*Held*, that the lessors, by granting the lease of the 17th December, 1898, elected to avoid their former lease, they having done nothing in the meantime to waive the forfeiture thereof incurred by the assignment to the plaintiff. The distress was no waiver of the forfeiture. The election to forfeit the original lease referred back to the time when the breach of the terms of that lease occasioning the forfeiture took place, that is, the date of the assignment. The forfeiture of the lease and the acceleration of the payment of the rent and taxes might have been avoided by giving, within one month from the execution of the assignment, a notice in writing to the lessors electing to retain the store for the unexpired term or a portion of it:—*Held*, also, that the condition that the defendant was to assume the rent and taxes and to arrange with the landlord as to tenancy, did not mean that the defendant was to assume any part of the rent and taxes which by virtue of the provision of the lease had become due on the previous 24th January, but rather that the defendant should arrange with the landlord as to tenancy and assume the rent and taxes payable in virtue of the tenancy so arranged. *Tew* v. *Routley*, 20 Occ. N. 36, 31 O. R. 358.

2. Consent — *Distress — Exemptions —Under-tenant.*] — Where it is expressly stipulated in the lease between the lessor and the principal tenant that the latter shall not sublet the whole or any part of the premises leased without the lessor's consent in writing being first obtained, a sub-tenant under a lease made without such consent cannot invoke the benefit of Art. 1639, C. C., which declares that the sub-tenant is held towards the principal lessor for the amount only of the rent which he may owe at the time of seizure of effects on the leased premises.—2. The right to select and withdraw from seizure the effects detailed in Art. 598, C. C. P., is established in favour of, and can only be invoked by, the debtor. An undertenant is not entitled to claim such exemption. *Hamilton* v. *Dwyer*, Q. R. 16 S. C. 469.

3. Mortgage of lease—*Discharge.*]—J. demised lands for a term of years with a provision against assignment by the lessor without his consent. The lessor assigned the lease by way of mortgage, and the consent of J. was indorsed thereon. The mortgagee, in an action by J., was adjudged liable as assignee for payment of rent and taxes, and, the lessor having died insolvent, was about to register a statutory discharge of the mortgage, when J. brought an action claiming a declaration that it could not be discharged without his consent and an injunction to restrain the mortgagee from doing so:—*Held*, affirming the judgment of the Court of Appeal, 26 A. R. 116, *ante* 132, that under the Judicature Act the Courts are bound to treat a mortgage, as Courts of equity have always done, as a mere accessory to the debt; that, the lessor having consented to the specific assignment, such consent included all such incidents as the law attaches to the covenants and agreements between the parties set forth in the deed, as well as the covenants and agreements themselves; one of such incidents being that, on repayment of the debt, the mortgagee would be obliged to re-assign the mortgaged lands; that the lessor could not prescribe the dealings between the parties as to the mortgage debt, and the mortgagee was free to release it if he chose; and that he did not require a further license from the lessor to do so. *Jamieson* v. *London and Canadian L. & A. Co.*, 19 Occ. N. 373, 30 S. C. R. 14.

V. Lease—Cancellation of.

Defect in premises.]—Where tenements are constructed in the manner adopted by a large number of architects and builders, the fact that noises incidental to the occupation of a lower tenement are heard by the occupant thereof coming from the upper tenement

is not a ground for resiliating the lease, although possibly a more effectual means of preventing communication of sound from one tenement to the other might have been devised. *Benoit* v. *Smith*, Q. R. 16 S. C. 591.

Defect in premises — *Damages.*]—1. A lessee is not entitled to ask for the resiliation of a lease by reason of a defect in the leased premises, the existence of which defect was known to him when he entered into the lease and accepted the premises.—2. The position of the lessee, as to his right to demand resiliation of the lease, is not altered by the fact that he recovered a small amount from the lessor in another Court as damages alleged to have resulted from the defect referred to.—3. A lessee is not entitled to vacate the leased premises and to ask for the resiliation of the lease by reason of a defect which did not render them uninhabitable, without first putting the lessor in default to remedy such defect. *Beauchamp* v. *Brewster*, Q. R. 16 S. C. 268.

Personal action — *Territorial jurisdiction—Superior Court.*]—An action for cancellation of a lease for a long term or a sale, on account of default in paymen of the price by the purchaser, or for non-performance of the obligations arising from the lease or sale, is a personal action, and should be brought in the Court of the district in which the contract was made, although the domicil of the defendant and the demised premises are in another district. *Marsolais* v. *Grenier*, 3 Q. P. R. 39.

Possession — *Personal action—Territorial jurisdiction.*]—Where the lessor, in a lease for a long term, demands against the holder of the lease that it shall be cancelled because of failure by the holder to perform his covenants, and that the possession of the demised premises shall be given up to him, the action is a personal one which is within the jurisdiction of the Court of the place where the lease has been executed. *Marsolais* v. *Grenier*, Q. R. 17 S. C. 296.

See COSTS, III. 1—COURTS, VI. 1—PARTNERSHIP, IV. 5.

VI. LEASE—RENEWAL OF.

1. Construction of lease — *Rent.*]—A clause in a lease providing for a renewal stated that the renewal lease was to be "at such increased rent as may be determined upon, as hereinafter mentioned, payable in like manner and under and subject to the like covenants, provisions, and agreements as are contained in these presents, including the covenant for renewal, such rent to be determined by three different disinterested persons as arbitrators." The lease further provided for payment of the yearly rent as follows: "For the first ten years of the said term eighty dollars per annum; for the remaining eleven years one hundred dollars per annum; all the said payments to be made half-yearly on the first day of January and July in each year:"—*Held*, that the proper manner by which the rent should be increased during the renewal term was by adding to each payment during the twenty-one years, that is to say, adding to the rent of $80 per annum for the first ten years of the renewal term and to the rent of $100 per annum for the remaining ten years of the renewal term,—and not by adding together the annual payments for twenty-one years and making an addition to that, nor by adding to the sum payable during the last year before the renewal:— *Held*, also, that the condition as to the rent for the new term being an increased rent might be satisfied by making a merely nominal addition, whereas here there was no increase in the rentable value of the premises. *In re Geddes and Garde, In re Geddes and Cochrane*, 20 Occ. N. 455.

2. Covenant—*Rent.*]—A lease of land, upon which there were no buildings except an old shed, contained a covenant by the lessor to grant, at the expiration of the term, if requested, "another lease" to the lessee "for the further term of twenty-one years," at such rent as might be agreed on or fixed by arbitration, "such renewed lease to contain a like covenant for renewal:"—*Held*, that the rent for the renewal term should be based upon the value of the land at the time of the renewal, and not upon the value of the land and of buildings erected by the lessee during the term. *Van Brocklin* v. *Brantford*, 20 U. C. R. 327, affirmed in appeal, 26th June, 1862, followed. Judgment below, 31 O. R. 335, 20 Occ. N. 39, affirmed. *In re Allen and Nasmith*, 20 Occ. N. 425, 27 A. R. 536.

3. Option — *Mortgage—Redemption.*]—Under a covenant in a lease that the lessors would, at the expiration of the term thereby granted, grant another lease, "provided the said lessee * * * should desire to take a further lease of said premises," no notice or demand by the lessee is necessary. The existence in fact of a desire for the further lease is all that is essential, and that desire may be indicated by conduct and circumstances. A lease of land, subject to two mortgages, contained a covenant by the lessor and the second mortgagee with the lessee, that the lessee might if he

desired to do so redeem the first mortgage, and that in that case the sum paid for redemption should be a first charge on the land:—*Held*, that the second mortgagee's right to redeem the first mortgage, after its acquisition by the lessee, was not taken away. *Brewer* v. *Conger*. 20 Occ. N. 59, 27 A. R. 10.

VII. Lease—Surrender of.

Estoppel—*Malicious civil proceedings—Pleading — Malice — Evidence — Onus.*]—Action for a balance of rent. The defendant relied upon a surrender by operation of law. In 1896 the defendant and his co-tenant, with the plaintiff's consent, leased a part of the land to one S., who entered into possession and paid the rent direct to the plaintiff, at the request of the defendant. On the 17th April, 1897, according to the defendant's story, at a time when he owed $100 for rent, the plaintiff agreed, in consideration of getting this money, to cancel the lease. This the plaintiff positively denied. The receipt alleged to have been given was not produced, nor was its disappearance accounted for. The defendant's evidence was taken on commission, and he was not examined in open Court. No new lease was granted and the plaintiff had not resumed possession:—*Held*, that there can be no estoppel by mere verbal agreement; there must, be, in addition to such agreement, some act which is inconsistent with the continuance of the lease. And in this case there was no surrender of the lease by operation of law. The defendant counterclaimed for damages against the plaintiff for (*a*) fraudulently and without any colour of right filing a plaint in the County Court claiming a lien; (*b*) causing a *lis pendens* to be issued against lands not included in the lease; (*c*) for registering such *lis pendens*:—*Held*, that to sustain such an action there must have been, by means of civil process, some unwarrantable interference with the person or property of the defendant in the original action:—*Held*, also, that the counterclaim did not disclose a good cause of action, because neither malice and want of reasonable and probable cause nor special damage were sufficiently alleged:—*Held*, also, that the onus of shewing malice or special damage was upon the defendant, and he had not succeeded in his proof. *Trim* v. *Baines*, 20 Occ. N. 145.

VIII. Lease — Termination of, and Notice to Quit.

1. "Disposing" of premises—*Sale—Misrepresentation — Covenant for quiet enjoyment.*] — A lease of premises used for a factory contained this provision: "Provided that in the event of the lessor disposing of the factory the lessees will vacate the premises if necessary on receiving six months' notice * * *." *Held*, reversing the judgment of the Court of Appeal, 26 A. R. 78, 19 Occ. N. 62, and that of Rose, J., 29 O. R. 75, 18 Occ. N. 64, that a parol agreement for the sale of the premises, though not enforceable under the Statute of Frauds, was a "disposition" of the same under said provision entitling the lessor to give the notice to vacate: — *Held*, further, that the lessor having, in good faith, represented that he had sold the property, with reasonable grounds for believing so, there was no fraudulent misrepresentation entitling the lessee to damages, even if no sale within the meaning of the provision had actually been made, nor was there any eviction or disturbance constituting a breach of the covenant for quiet enjoyment. *Gold Medal Furniture M'f'g Co.* v. *Lumbers*. 19 Occ. N. 375, 30 S. C. R. 55.

2. Ejectment — *Pleading—Waiver.*]—Where in an action in ejectment, the lessee pleads that he has never received any notice that his lease was terminated, the plaintiff may answer such plea by stating that the notice that the premises were to let had been put up for three months before the termination of the lease, and that the defendant asked for a longer delay to move out. *Berthel* v. *Duceppe*, 3 Q. P. R. 229.

3. Lease for a year—*Overholding.*]—In the case of a lease for a year where the tenancy continues after the expiry of the year without any agreement, the rent being paid monthly, the tenancy may be terminated by a month's notice to quit.—2. Although the notice should be in writing, where the lease is in writing, a verbal notice is sufficient when the opposite party admits its receipt either in writing or under oath. *Marson* v. *Hughes*, Q. R. 17 S. C. 1.

4. Verbal lease—*Rent in advance.*]—To put an end to a verbal lease agreed to for one year and paid in advance, the lessor must give a three months' notice, pursuant to Art. 1657, C. C. *Hébert* v. *Laberge*, 2 Q. P. R. 392.

IX. Lease—Other Cases.

1. Conditions of lease—*Objections taken on appeal for first time.*]—Where the issues have been joined in a suit and judgment rendered upon pleadings admitting and relying upon a written instrument, an objection to the validity

of the instrument taken for the first time on an appeal to the Supreme Court of Canada comes too late and cannot be entertained. Where a written lease of lands provides for the payment of indemnity to the lessees in case they shall be dispossessed by the lessor before the expiration of the term of the lease, the lessees are entitled to claim the indemnity upon being so dispossessed, although the eviction may be for cause, inasmuch as the lessor could not, under the lease, dispossess the lessee except for breach of the conditions therein mentioned. *Regina* v. *Poirier*, 19 Occ. N. 378, 30 S. C. R. 36.

2. Emphyteusis — *Bail-à-rente — Petitory action—Transfer by lessee.*]—An instrument by which lands were leased for sixteen years at an annual rental, subject to a renewal for a further term of twelve years, provided for the construction of certain buildings and improvements by the lessee upon the leased premises, and hypothecated these contemplated ameliorations to secure payment of rent and performance of the obligations of the lessee. On disturbance, an action, with both petitory and possessory conclusions, was brought by a transferee of the lessee against an alleged trespasser, who pleaded title and possession in himself without taking objection to its cumulative form :—*Held*, that, under the circumstances, the action should be treated as petitory only; that the contract under the instrument described was neither emphyteusis nor a *bail-à-rente* (lèase in perpetuity), but merely an ordinary contract of lease which conveyed no title to land or real rights sufficient to confer upon the transferee the right to institute a petitory action :—*Held*, also, that a deed of sale from the lessee would not support the petitory action, as the lessee could not transfer proprietary rights which he did not himself possess. *Price* v. *LeBlond*, 20 Occ. N. 449.

3. Formal denial — *Absence of — Recognition.*]—A lease under seal which is not denied in the manner provided by Art. 208, C. P., must be considered as recognized by the person against whom it is set up. *Thurston* v. *Hughes*, Q. R. 16 S. C. 472.

X. Overholding Tenants Act.

Demand—*Notice — Copies.*] — In proceeding for an order for possession under the Overholding Tenants Act, R. S. M. c. 112, the demand in writing served by the landlord under s. 3 was unsigned, but was otherwise sufficient in form. When it was served, its purport was verbally explained to the tenants, and they were told that it was from the landlord's agent, and one of them then went to see the latter about it:—*Held*, sufficient. *Morgan* v. *Leach*, 10 M. & W. 558, followed. At the hearing it was objected that the copies served with the notice of the application, as required by s. 5, were not annexed to the notice :—*Held*, that delivery of the copies with the notice was probably sufficient; but at any rate the objection should have been taken as a preliminary objection. *In re Sutherland and Portigal*, 19 Occ. N. 257, 12 Man. L. R. 543.

See VIII. 3.

XI. Rent.

Evidence — *Hypothec — Nature of action.*]—The hypothec securing a certain *rente* cannot be extended beyond the limits of the piece of ground described in the deed constituting that rent.—2. No hypothec can result from any alleged verbal contract to pay a certain rent.—3. A contract to pay an annual rent forever cannot be proved by mere parol testimony.—4. If the ground occupied is greater than that described in the deed constituting the rent, the action should be to compel the defendant to restrict his possession to the limits expressed in the deed, and to obtain a "quantum meruit" sum as the value of the past use and occupation of the excess. *Bourk* v. *Cormier*, Q. R. 16 S. C. 295.

LAW SOCIETY.

See Solicitor, IV.

LEASE.

See Appeal, XIII. 3—Contract, III. 3, 5 — Ferry, 1 — Landlord and Tenant.

LEGACY.

See Executors and Administrators, 2—Infant, II. 1—Will.

LEGISLATURE.

See Constitutional Law.

LIBEL.

See Defamation.

LICENSE.

See CONTRACT, III. 5—LIQUOR LICENSE ACT — MUNICIPAL CORPORATIONS, IV. 4, XV. 4.

LIEN.

See MECHANICS' LIENS—MORTGAGE, IV. —PARTNERSHIP, IV. 1.

LIEUTENANT-GOVERNOR.

See WAY, I.

LIFE INSURANCE.

See INSURANCE, V., VI.

LIMITATION OF ACTIONS.

1. Annuity by will—*Charge on lands —Arrears—Disability.*]—A testator by his will devised land to two of his sons, their heirs and assigns, forever, subject to the payment of $200 per annum for the benefit of another son (a lunatic), for his life, payable "to the person who may be his guardian," and died in 1872. This son lived with his mother, and payments were made to her for his support from 1880 to 1889, the last payment being made in February, 1889. The plaintiffs were appointed committee for the son in December, 1898:—*Held*, following *Hughes* v. *Cole*, 27 Ch. D. 231, that the annuity was charged on the land, and that the right to recover was not barred as to future payments of the annuity out of the land; that the payments made to the mother were discharges *pro tanto* of the annuity; that, as the son was under a disability until the plaintiffs' appointment, and as twenty years are allowed within which to bring an action in such a case, they were entitled to recover the annuity from February, 1890, and, as the annuity was an express charge on the land, it might be sold to satisfy the arrears. *Trusts and Guarantee Co.* v. *Trusts Corporation of Ontario*, 20 Occ. N. 120, 31 O. R. 504.

2. Foreign contract — *Pleading.*]—The plaintiff should allege in his declaration all that is essential to the maintenance of the right of action which he asserts.—If his declaration discloses an action absolutely prescribed according to our law, he cannot, in reply to a plea of prescription, allege that his action is governed by the law of a foreign country which does not recognize such prescription, even when the declaration discloses that the contract was made in that country. *Shattuck* v. *Tyler*, Q. R. 16 S. C. 401.

3. Judgment—*Revivor—Time—Notice.*]—In 1894 the plaintiff obtained *ex parte* (the defendant being out of the jurisdiction) an order reviving a judgment for the payment of money which he had recovered against the defendant in 1875, and allowing the entry of a suggestion on the judgment roll, and the issue of execution. The plaintiff entered the suggestion in 1894, and afterwards examined the defendant as a judgment debtor, whereupon the defendant made an offer of settlement, which was not accepted. The plaintiff died in 1895 and the defendant in 1899, after which the personal representative of the plaintiff obtained an order on praecipe reviving the action in his name as plaintiff and in that of the personal representative of the defendant as defendant:—*Held*, that the last order should have been made on notice, but it was proper to treat an application to set it aside as a substantive motion on notice, and, so treating it, the order should be confirmed. The order made in 1894 reviving the judgment should have been made on notice, under the Common Law Procedure Act, then in force, but, under the circumstances of the defendant's absence from the country, his subsequent examination, and the attempted settlement, it was a valid and binding order:—*Held*, also, following *Mason* v. *Johnston*, 20 A. R. 412, that the judgment remained in force for twenty years, and the entry of the suggestion within that time was effectual to renew the time from which the statute begins to run. *Allison* v. *Breen*, 20 Occ. N. 166, 19 P. R. 119.

(See the next case.)

4. Judgment—*Revivor—Time—Notice—Ex parte order—Application to set aside.*]—Decision in 20 Occ. N. 103, 19 P. R. 119, refusing to set aside order reviving judgment, affirmed on appeal. *Boice* v. *O'Loane*, 3 A. R. 167, as to the lifetime of a judgment, followed in preference to English decisions. The practice of dealing with the question raised on an application to set aside an *ex parte* order as if the application were a substantive one for such order, approved. *Allison* v. *Breen*, 20 Occ. N. 207, 19 P. R. 145.

5. Malpractice—*Physicians and surgeons — Contract.*]—The prescription provided by Arts. 2261 and 2262 is not applicable to a wrong arising out of contract, in the case, for example, of a physician or surgeon guilty of want of skill and of negligence in the exercise of his profession. *Griffith* v. *Harwood*, Q. R. 9 Q. B. 299, 2 Q. P. R. 485.

6. Master and servant—*Injury to servant.*]—Under Art. 2262, C. C., the action of a workman against his employer for the recovery of damages for bodily injuries received in the course of his employment, is prescribed by one year, and the Court is bound to apply the prescription although not pleaded. The doctrine of *faute contractuelle* does not apply to such case. *Robillard* v. *Wand*, Q. R. 17 S. C. 456.

7. Money demand — *Statute — Dual language—Set-off—Delay — Pleading—Costs — Success in part.*] — The prescription established by paragraph 4 of Art. 2262, C. C., only applies to actions by hotel keepers, boarding-house keepers, and other tradesmen, and not to a bill for board by one who does not make a trade of keeping a boarding-house.—2. The English text of paragraph 4 of Art. 2262, being more in accord with the law as it stood at the time of codification, should prevail over the French text.—3. In an action to recover the amount due under a covenant the defendant cannot claim a set-off for twenty-one years' board, when, in view of intervening transactions between the parties, such claim will give rise to a serious contest—it cannot be adjusted promptly or summarily, but, on the contrary, will necessitate a difficult accounting and a long inquiry—and it is also claimed in another action between the parties.—4. Since the new Code of Civil Procedure, it is sufficient, in a plea of set-off, to ask for the dismissal of the action; it is not necessary to ask the Court to order the set-off.—5. In this case, the appellant, having succeeded in reversing the judgment below in so far as it declared the debt which he asserted as a set-off to be prescribed, which judgment, if unreversed, could have been invoked against him in another action, was entitled to his costs of appeal. *Naud* v. *Marcotte*, Q. R. 9 Q. B. 123.

8. Money in Court—*Payment out by mistake — Lapse of time—Restitution—Interest.*]—Statutes of Limitation have relation only between subject and subject —the Crown cannot be bound by them. The Court is a public trustee as to all moneys and securities in its hands. Moneys in Court are in *custodia legis*—in this case tantamount to *custodia regis*, and to such a fund and such a custodian the Statute of Limitations has no pertinence. Suitors and claimants are not barred by any lapse of time in their application for payment out of Court of moneys to which they are entitled, and reciprocally they should not be protected by lapse of time from making restitution if they have improperly or fraudulently received moneys from the Court to which they had no just claim; and an order was made ordering restitution after a period of fourteen years, although without interest, as the mistake was that of an officer of the Court. Where moneys in Court have been improperly paid out in an action, a motion to compel a refund is the proper procedure. *Allstadt* v. *Gortner*, 20 Occ. N. 100, 31 O. R. 495.

9. Payment of money — *Order for— Instalments — Commencement of prescription.*]—The defendant had given to the plaintiff an order on the Richelieu & Ontario Navigation Company to receive $20 a month on his wages till the whole amount which he owed to the plaintiff should be paid. Subsequently he left the employ of the company, and thereby deprived the plaintiff of the benefit of the order. He contended that the whole balance due to the plaintiff was prescribed because more than five years had elapsed since he had left his employment:—*Held*, that the debtor cannot invoke against his creditor Art. 1092, C. C., so as to make it imperative on the latter to sue before the lapse of the term stipulated between them. It is optional on the part of the creditor to avail himself of that Article or not.—2. The prescription, in cases like this one, begins to run only on each instalment as it matures, according to the terms of the order or draft. *Laliberté* v. *Gagnon*, Q. R. 16 S. C. 292.

10. Personal injuries — *Subsequent damages — Reservation of rights.*]—The reserve, in a judgment awarding damages for bodily injuries, of the plaintiff's recourse for damages resulting from the same accident subsequent to the judgment, has the effect of interrupting prescription, and therefore an action may be brought for the recovery of subsequent damages, although more than a year has elapsed since the date of the accident. *Racicot* v. *Ferns*, Q. R. 17 S. C. 337.

11. Promissory note — *Acknowledgment in writing — Revival of liability — Agent of executor—Letter to third person—Admissibility.*]—The executor of the will of one of the joint makers of a promissory note proved the will after the debt on the note as against the testator or his estate became barred by the Statute of Limitations. The will directed that all the testator's just debts should be paid by his executors as soon as possible after his death. The executor, who lived out of Ontario, executed a power of attorney to the other joint maker of the note, who was primarily liable on it, and against whom it had been kept alive by payments, to enable him in Ontario "to do all things which might be legally requisite for the due proving and carrying out of the provisions" of

the will—the executor having at this time no knowledge of the note:—*Held*, that a letter written by the surviving maker shortly after the execution of the power of attorney, even if in its terms sufficient, was not such an acknowledgment, within R. S. O. c. 146, s. 1, as would revive the liability after the expiry of six years; for there was no trust created by the will for the payment of debts, nor was there any legal obligation on the part of the executor to pay statute-barred debts, and the surviving maker was not an agent "duly authorized" to exercise the discretion which an executor has to pay such debts. Three years later the executor wrote to the holder of the note to the effect that the holder ought to look to the surviving maker for payment, as he was now doing well:—*Held*, that this, though some recognition of the debt, was not sufficient—there must be such a recognition as amounts to a promise or undertaking to pay. Just before this action was brought to recover the amount of the note, the executor wrote to the plaintiffs' solicitors asking them not to take any further steps till he could hear from the surviving maker; and to the latter he wrote: "The debt is owing, and they are anxious to get their estate settled up." *Held*, insufficient as an acknowledgment, and that the letter to a third person—not the creditor — was not admissible. *Goodman* v. *Boyes*, 17 A. R. 528, followed. *King* v. *Rogers*, 20 Occ. N. 209, 31 O. R. 573.

12. Recovery of land—*Mortgage — Possession—Payments—Agent — Novation — Extension of time.*]—In ejectment by a mortgagee against the widow of the mortgagor, it appeared that she had been in possession since his death in 1877, and had paid nothing on account of the mortgage since 1881. Payments had, however, been made upon a collateral mortgage over other lands, by a person who had purchased such lands from the mortgagee and the widow, up to 1897. But in 1887 this person made a new agreement with the mortgagee by which the time for payment of the balance then due was extended and the rate of interest reduced, without the knowledge or consent of the principal debtor:—*Held*, that the payments made by this person after the new bargain were not payments made by him as agent of the principal debtor, nor as one liable or entitled to pay off the mortgage debt secured by the principal mortgage, nor were they payments made on account of the principal debt. *Farmers' L. & S. Co.* v. *Sprott*, 20 Occ. N. 165.

13. Right of way—*Railways—Crossing.*]—When a line of railway severs a farm, and no crossing is provided by the company, a right of way across the line may be acquired by the owner of the farm by prescription. A farm crossing provided by a railway company may be used by any person who after the severance becomes the owner of portions of the farm on both sides of the line of railway, and has a right of access to the crossing. A right of way may be acquired although the dominant tenement is not contiguous to the servient tenement. *Guthrie* v. *Canadian Pacific R. W. Co.*, 20 Occ. N. 56, 27 A. R. 64.

14. Sale of goods — *Warranty — Fraud.*] — The defendant, who was a nurseryman, sold to the plaintiff a number of peach trees, giving a warranty that they were "No. 1 peaches, warranted true to name." *Held*, that this was a warranty that the trees were of the varieties contracted for, not that the fruit would be of those varieties; that the trees not being of the varieties contracted for, the warranty was broken at the time of the sale; and that, in the absence of fraud, an action for damages for its breach brought more than six years after the sale was barred, although until the trees came into bearing shortly before the action it was impossible to tell they they were not of the varieties contracted for. *Bogardus* v. *Wellington*, 20 Occ. N. 398, 27 A. R. 530.

See ASSESSMENT AND TAXES, IV. — EXECUTORS AND ADMINISTRATORS, 2, 6, 7—FRAUDULENT CONVEYANCE, 1, 2, 5—HUSBAND AND WIFE, V. 1—JUDGMENT, II. 2, V. 9—MECHANICS' LIENS, III. 6—PARTITION, 1—PEREMPTION—PLEADING, VIII. 1—REGISTRY LAWS, IV.—SALE OF GOODS, V.—WAY, VI. 3.

LIQUOR LICENSE ACT.

I. NEW BRUNSWICK.
II. NOVA SCOTIA.
III. NORTH-WEST TERRITORIES.
IV. ONTARIO.
V. QUEBEC.

I. NEW BRUNSWICK.

Conviction—*Certiorari — Magistrate — Rejection of evidence — Disqualification — Bias — Ratepayer — Witness.*]—An order *nisi* having been obtained to quash a conviction for selling liquor without a license upon the ground, among others, of the improper rejection of evidence tendered on behalf of the defendant:—*Held*, that this was no ground for *certiorari*. There was a number of other

objections going to shew that the magistrate was disqualified by reason of his relationship to the real prosecutor and by reason of bias, etc., but it was held that these objections were not established in point of fact. The defendant applied to call the magistrate as a witness, but, as he declined to state in any other than in a general way what he proposed to prove by him, the magistrate refused to leave the Bench to be sworn. In this he was sustained by the Court, notwithstanding the defendant swore that the application was made in good faith. The magistrate is not disqualified because of his being a ratepayer in the district where the case was tried. *Certiorari* is taken away in cases of convictions for selling without license by the Liquor License Act, 1896, s. 104. *Ex p. Hebert*, 34 N. B. Reps. 455.

II. Nova Scotia.

1. Conviction — *Sale—Unlicensed premises—Colourable lease—Illegal contract — Appeal — County Court.*]—The defendant sought to set aside a conviction for selling intoxicating liquors contrary to law, on the ground that the premises in which the sale was admitted to have taken place, although the property of the defendant, were at the time of the sale under lease to M., and that defendant was in possession solely as the agent or servant of M. The evidence shewed that defendant was not in receipt of wages from M., that no books were kept containing any account of income and expenditure, that no inventory was made of the contents of the premises at the time of the alleged lease, that no method was provided of fixing or accounting for the value of any article lost, injured, or destroyed during the term of the lease, and that no change was made in the occupation or management of the premises, the defendant's name remaining on the door as proprietor:—*Held*, that the lease was a mere cover to enable the defendant to continue the business, that the defendant was the occupant of the premises within the meaning of the Liquor License Act, 1895, s. 128, and that the conviction must be affirmed:—*Held*, also, that the contract between defendant and M., being to do a thing which could not be performed without a violation of law, was void:—*Held*, also, that the effect of the appeal to the County Court was to vacate the judgment appealed from, and that the Judge of the County Court was required to try the case *de novo*, and to make such conclusion upon the evidence as he thought just, whether he took new evidence or not. *Regina v. McNutt*, 33 N. S. Reps. 14.

2. Licensed premises—*Neighbourhood of railway—Prohibition of statute—Mayor of city—Refusal to sign license—"Railway" —Extension.*] — By the N. S. Liquor License Act of 1895, s. 27, subject to the provisions of s.-s. (2), i was enacted that no license should be issued for the sale of liquor in any place situate within a distance of one hundred yards from any place of worship, public school, etc. Sub-section (2) made an exception, enabling the council to continue to grant a license in any case in which a person held on the 15th April, 1891, and continuously since that date, a lawful license for the sale of liquor within the limits referred to. By the Acts of 1896, c. 25, s. 6, the prohibition contained in s. 27 was so extended as to include "any railway other than a street railway." By the Acts of 1897 c. 10, s. 3, s.-s. (2) of s. 27 was amended in such a way as to authorize the council to continue to grant a license for the sale of liquor upon premises which had been "continuously licensed up to the 15th day of March, 1896," but it was provided that this should not be held to affect in any way the provisions of s. 6 of c. 25 of the Acts of 1896:—*Held*, that the effect of the latter amendment was to leave in force the prohibition as to the granting of a license in respect to a place within one hundred yards of a railway, and that, where the premises in respect to which the license was applied for were within the prohibited distance, a license could not be granted:—*Held*, that in granting a license to a person whose premises were within the prohibited distance, the city council of the city of Halifax exceeded its power, and that the mayor of the city, knowing the objection, was justified in refusing to sign the license. In February, 1895, the railway sheds at the deep water terminus of the Intercolonial Railway at Halifax were destroyed by fire, and in the same year the track was extended along the front of the property of S. Cunard & Co., for the purpose of conveying passengers and freight:—*Held*, that the track so built was a railway within the meaning of the Act. *In re Quinn*, 32 N. S. Reps. 542. (See also *In re Fitzpatrick*, 19 Occ. N. 396, 20 Occ. N. 135.)

III. North-West Territories.

Conviction—*Certiorari — Findings of fact—Scienter—Mens rea.*]—The applicant was convicted, under the N.-W. T. Act,

s. 95, for having in his possession intoxicating liquor without the special permission in writing of the Lieutenant-Governor. On a motion for a *certiorari* to quash the conviction:—*Held*, following *Barber* v. *Nottingham and Grantham R. W. Co.*, 15 C. B. N. S. 726, and *Regina* v. *Grant*, 14 Q. B. 43, that where the charge is one which, if true, is within the magistrate's jurisdiction, the findings of fact by him are conclusive. 2. That, as the statute does not express knowledge by the accused of the intoxicating character of the liquor to be an essential element of the offence, first, it was not necessary for the prosecution to allege or prove it; second, it was necessary for the accused to prove, not merely that he had no such knowledge, but that he had been misled without fault or carelessness on his part. *Regina* v. *O'Kell*, 1 Terr. L. R. 79.

IV. Ontario.

1. Local option by-law — *Deputy returning officers — Defect.*]—When a by-law requires the assent of the electors, the deputy returning officers to take their votes should be named in the by-law; and a by-law passed under s. 141 of the Liquor License Act, R. S. O. 1897 c. 245, from which their names were omitted, was quashed, even although deputy returning officers were subsequently appointed by a general by-law. *In re McArtee and Township of Mulmur*, 20 Occ. N. 367, 32 O. R. 69.

2. Prior conviction — *Proof of.*]—Under s.-ss. 1 and 2 of s. 101 of the Liquor License Act, R. S. O. c. 245, it is not necessary that the proof of the prior conviction should be by the production of the formal conviction or by a certificate thereof, other satisfactory evidence being by the statute declared to be sufficient. Where, therefore, on a trial before a magistrate—being the same magistrate by whom the defendant had been previously convicted of a like offence—the information alleging such prior conviction, all that appeared with regard to it was the evidence of the license inspector, who proved that the defendant was the person previously convicted:—*Held*, that it must be assumed that the magistrate satisfied himself as to the prior conviction, the inspector's evidence only being necessary to prove the identity of the defendant. *Regina* v. *McGarry*, 20 Occ. N. 170, 31 O. R. 486.

3. Unlicensed premises — *Search — Stranger — Warrant — Sale—Proof.*]—The right of entry under s. 130 of the Liquor License Act, R. S. O. c. 245, into any inn, tavern, etc., to make search for liquor, is limited to the persons named therein, namely, "any officer, police constable, or inspector;" and it is only under s. 131, on the procuring a warrant as therein provided, that the officer, etc., can take with him a person not being one of those named. Where, therefore, a license inspector took with him a person, not being one of those so named, without having procured a warrant, his act was illegal, and the defendant justified in resisting it; and a conviction for obstructing the inspector in the discharge of his duty was quashed. The defendant's premises had been licensed as a tavern, but the license had expired, and the only evidence of liquor being sold or reputed to be sold therein, was the statement of the inspector that the defendant's bar-room remained the same as before, *i.e.*, before the expiry of his license. *Per* Meredith, C.J.—This was not sufficient to satisfy the requirements of the section. *Per* Meredith, C.J., also, that, under the circumstances of this case, an objection that reasonable grounds had not been shewn for suspecting that some violation of the Act was taking place or was about to take place, was not tenable. *Regina* v. *Ireland*, 20 Occ. N. 4, 31 O. R. 267.

V. Quebec.

1. Conviction — *Certiorari—Informant—False name—Date of summons—Fee of Clerk.*]—The fact that, upon a penal prosecution for selling intoxicating liquors to a minor, the complainant (the alleged minor), who has also given evidence as a witness to prove the offence, has given a false name, does not take away from the Recorder's Court the jurisdiction which it has over such offences, and is not a ground for a *certiorari*.—2. An error in the summons, by which it is made to bear date on the day on which it is returnable, and in fact returned, when it is ascertained that the summons was served on the day on which it was issued, is not a ground for a *certiorari*, if the defendant has not objected to the irregularity before the Recorder.—3. The Clerk of the Recorder's Court, being an advocate, may charge the defendant with the fee of $8 mentioned in Art. 1060, R. S. Q. *Pepin* v. *City of Montreal*, 2 Q. P. R. 365.

2. Prosecution — *Police magistrate—Adjournment—Time—Conviction — Evidence of accused.*]—Where a police magistrate, upon a prosecution for selling intoxicating liquors without a license, reserves his judgment, he cannot legally make a conviction except upon a day fixed by him at the time of the hearing, and within a period not exceeding eight days

from the adjournment; and if he makes a conviction at a more distant date, and on a day not fixed at the time of hearing, a writ of *certiorari* will be granted.—2. The Evidence Act of Canada, 1893, does not apply to a prosecution for selling liquors without a license instituted pursuant to the Provincial statutes in that behalf; and a magistrate trying such a case has the right to refuse to hear the defendant as a witness in his own behalf. *Re Cairns and Choquet*, 3 Q. P. R. 25.

3. Selling—*Penalty—Evidence.*]—In an action to recover the penalty of $120 imposed by the License Act for selling liquor without a license, having regard to Arts. 1031 and 1035 of the Act, the evidence should be taken down in writing. *Symmes* v. *Hillman*, 2 Q. P. R. 477.

LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, X.

LOCAL JUDGES AND MASTERS.

1. Jurisdiction—*Referring actions to Drainage Referee.*]—A local Master of the High Court has jurisdiction by virtue of Rules 42 and 49—see also Rule 6 (*a*)—to make an order, under s. 94 of the Municipal Drainage Act, R. S. O. c. 226, referring an action brought in his county to the Referee under the Drainage Laws. *McKim* v. *Township of East Luther*, 20 Occ. N. 399, 19 P. R. 248.

2. Jurisdiction — *Winding-up—Motion to rescind.*]—A local Judge of the Supreme Court has no jurisdiction to make a winding-up order. An order made *ultra vires* should be moved against, not appealed from. *In re Kootenay Brewing Co.*, 7 Brit. Col. L. R. 131.

3. Resignation — *Concurrent appointments.*]—While an appeal from his report was pending a local Master sent a letter of resignation to the Attorney-General's department, and, without any acceptance of this resignation, a commission was issued appointing another gentleman "a local Master" for the county in question. Subsequently the appeal was allowed, and the report was referred back to "the Master" for the county:—*Held*, that there could not be two local Masters; that the action of the executive was equivalent to an acceptance of the resignation; and that the reference must proceed before the new incumbent of the office. *In re Glen—Fleming* v. *Curry*, 20 Occ. N. 198, 27 A. R. 144.

See COURTS, IV.—WRIT OF SUMMONS, IV. 3.

LOCAL OPTION.

See LIQUOR LICENSE ACT, IV. 1.

LORD CAMPBELL'S ACT.

See CROWN, II. 1—DAMAGES, 2 — EXECUTORS AND ADMINISTRATORS, 3—WAY, V. 1.

LORD'S DAY ACT.

See SUNDAY.

LOTTERY.

See PROHIBITION, III. 2.

LUNATIC.

1. Action by—*Dismissal—Reservation—Costs.*]—If the plaintiff in an action is not in full possession of his mental faculties and is notoriously of unsound mind, and incapable of giving a valid consent to the suit begun, it will be dismissed (reserving rights), upon *exception à la forme*, without costs. *Parizeau* v. *Belanger*, 2 Q. P. R. 388.

2. Death of committee — *Interim appointment.*]—On the death of the committee of the person and estate of a lunatic, the Court appointed the lunatic's son interim committee upon his own petition *ex parte*. *In re Light*, 1 N. B. Eq. Reps. 96.

3. Maintenance—*Money in bank—Attachment by creditor.*]—Where money of a lunatic deposited to his credit in a bank was attached by a creditor, it was, nevertheless, ordered to be paid into Court for the maintenance of the lunatic, without prejudice to any priority over other creditors which the attaching creditor might have obtained as to any surplus which might remain if the lunatic should die or recover. *In re Vernon*, 20 Occ. N. 309.

4. Proceedings to set aside interdiction — *Recovery of costs—Solicitor.*]—An advocate or notary, acting upon the instructions of an interdict for insanity, and in good faith believing that the cause of interdiction has ceased, is not entitled to recover from the curator the

costs of proceedings unauthorized by him for the removal of the interdiction, which proceedings failed on the ground that the cause of interdiction had not ceased. *Semble*, a judgment setting aside the interdiction would have a retroactive effect to the date of the cessation of the cause of interdiction, and would necessarily validate an agreement by the interdict to pay the costs of the proceedings to obtain the removal of the interdiction. *Bouchard* v. *Bastien*, Q. R. 16 S. C. 565.

MAGISTRATE.

See JUSTICE OF THE PEACE — PROHIBITION, III.

MAINTENANCE.

See LUNATIC, 3.

MALICIOUS INJURY TO PROPERTY.

See CRIMINAL LAW, VII. 8.

MALICIOUS PROCEDURE.

1. Civil action — *Damages—Costs.*]—*Held*, following *Scott* v. *McCaffrey*, Q. R. 1 Q. B. 123, that a creditor is not responsible for damages (irrespective of costs) caused by proceedings taken by him, in good faith and without malice or want of probable cause, for the recovery of a debt before a Court of justice, even when such proceedings have been declared void for informality or illegality. *Darveau* v. *O'Dell*, Q. R. 17 S. C. 334.

2. Criminal prosecution — *Reasonable and probable cause—Belief—Malice—Jury.*]—In an action for malicious prosecution the Judge intimated that he thought there was no evidence to go to the jury, but he decided to let the case go to the jury so that the full Court might have the benefit of the findings in case an appeal was taken. The jury found that defendant had not taken reasonable care to inform himself of the facts before he proceeded against the plaintiff, and that he did not honestly believe in the charge, being actuated by an indirect motive, viz., to obtain recompense for the loss of his horse. Damages were assessed at $200. The Judge dismissed the action, holding that there was not a want of reasonable and probable cause: —*Held*, by the Court, that on the findings the plaintiff was entitled to judgment. *Shrosbery* v. *Osmaston*, 37 L. T. N. S. 792, followed. *Baker* v. *Kilpatrick*, 7 Brit. Col. L. R. 150.

See LANDLORD AND TENANT, VII.—PLEADING, IX. 2.

MALPRACTICE.

See LIMITATION OF ACTIONS, 5.

MANDAMUS.

1. Division Court — *Committal of judgment debtor—Non-production of books—Notice of motion—Uncertificated solicitor.*]—A Judge refused to commit the defendant for non-production of his books under a *subpœna duces tecum*, and pursuant to notice, on his examination as a judgment debtor under s. 243 of the Division Courts Act, in a Division Court plaint, because, there being no express provision in the Division Courts Act authorizing a committal for non-production of books, and the liberty of the subject being involved, he thought it wiser to take that course :—*Held*, without expressing any opinion as to whether the Judge was right or wrong in his view, in favour of which there was a good deal to be said, that the Judge having given judgment in a matter within his jurisdiction, mandamus would not lie to compel him to give a different judgment. A preliminary objection that the notice of motion was given by an uncertificated solicitor was answered by *Sparling* v. *Brereton*, L. R. 2 Eq. 64. *In re Jackson* v. *Clark*, 20 Occ. N. 42.

2. Officers of municipal corporation—*Designation.*]—A writ of mandamus addressed to two persons, to one as secretary and to the other as assistant-secretary, will be maintained against the former, and set aside with costs as against the latter, if it is shewn that the latter does not in fact occupy the position.—2. A mandamus addressed to two persons whose concurrence is necessary to accomplish the act ordered to be done, will be set aside as against both if it is declared illegal as to one of them; but it will be otherwise if such act can be done by one only of these two persons.—3. The fact that the writ has been addressed to two defendants as notaries, and that in the petition annexed thereto they are respectively designated as secretary and assistant-secretary of the corporation of a town, does not prevent the designation being sufficient, although the only office recognized by law is that of

secretary-treasurer of the town. *Mercier* v. *Roy*, Q. R. 16 S. C. 510.

See COMPANY, VI. 3 — JUSTICE OF THE PEACE, 4—MUNICIPAL CORPORATIONS, VII. 1, 2, VIII. 4—SCHOOLS, 1—SHERIFF, 2—WAY, IV. 4.

MANSLAUGHTER.

See CRIMINAL LAW, IV.

MARINE INSURANCE.

See INSURANCE, VII.

MARITIME LAW.

See SHIP.

MARKETS.

See MUNICIPAL CORPORATIONS, XI.

MARRIAGE.

1. Domicil—*Foreign law.*]—Two Canadians who are married in a foreign country and who establish themselves there are considered to have renounced their domicil of origin, and are governed by the foreign law as to the civil consequences of their marriage. *Marchildon* v. *Chandonnet*, Q. R. 17 S. C. 226.

2. Evidence — *Ecclesiastical laws.*]—*Held*, affirming the judgment in Q. R. 15 S. C. 147, that the recognition by Art. 127, C. C., of certain impediments to marriage does not oblige the Courts of the Province to take judicial notice of the ecclesiastical laws which establish such impediments; and therefore the existence of such laws must be alleged and proved by those who wish to take advantage of them. *De Grandmont* v. *Société des Artisans*, Q. R. 16 S. C. 532.

See CRIMINAL LAW, I. — HUSBAND AND WIFE—INFANT, II. 2.

MARRIED WOMAN.

See COMPANY, II. 4 — HUSBAND AND WIFE.

MASTER.

See LOCAL JUDGES AND MASTERS, 3.

MASTER AND SERVANT.

I. APPRENTICE.
II. FACTORIES ACT, ONTARIO.
III. HIRING.
IV. INJURY TO SERVANT — GENERALLY.
V. INJURY TO SERVANT — EMPLOYERS' LIABILITY ACT, B. C.
VI. INJURY TO SERVANT — WORKMEN'S COMPENSATION ACT, ONTARIO.
VII. INJURY TO THIRD PERSON BY SERVANT.
VIII. SECRET PROFITS OF SERVANT.

See CERTIORARI, 1—DEFAMATION, 3—INSURANCE, I. 2, II., IV. — RAILWAYS AND RAILWAY COMPANIES, X.

I. APPRENTICE.

Articles of apprenticeship — *Unreasonable provision.*]—*Held*, that a provision in articles of apprenticeship which required the apprentice, during the term of four years of 310 working days, to give and devote to a firm, to whom he was apprenticed, ten hours each working day, or such number of hours as might be fixed by the regulation of the workshop for the time being, or as special exigencies of the business might require, was unreasonable, and could not be enforced against the infant; and therefore an action was not maintainable against the defendant, who was security under the articles for the performance of the infant's duties, to recover damages for the breach thereof. *Regina* v. *Lord*, 12 Q. B. 757, followed. *MacGregor-Gourlay Co.* v. *Sully*, 20 Occ. N. 174, 31 O. R. 535.

II. FACTORIES ACT, ONTARIO.

Definition of "factory" — *Persons "employed."*] — Premises where seven persons are found working upon or about the machinery, but three are the employers of the others, in a place "where not more than five persons are employed," within the meaning of the proviso in s. 2 of the Factories Act, R. S. O. c. 256; and a conviction of the three employers, under s. 19, for keeping the premises in a dangerous state was quashed. *Regina* v. *Weir*, 20 Occ. N. 232.

III. HIRING.

1. Contract — *Leaving service—Quantum meruit.*]—The plaintiff's claim was

for four months' wages. He swore that the hiring was by the month, at $17 per month, but the defendant stated that the hiring was for a definite period of eight months for $130, no time having been fixed for payment, and his account was corroborated by a witness who was present when the bargain was made. The plaintiff left the service of the defendant after four months without his consent and without any valid reason or excuse :—*Held*, following *Smith* v. *Hughes*, L. R. 6 Q. B. 597, that the plaintiff was bound by his bargain, even if he had misunderstood the legal effect of it, and could not recover anything for his services without fully completing his contract. *Cutter* v. *Powell*, 2 Sim. L. C. 1, and *Britain* v. *Rossiter*, 11 Q. B. D. 123, followed. *Know* v. *Munro*, 20 Occ. N. 141, 13 Man. L. R. 16.

2. Wrongful dismissal — *Voluntary leaving—Onus—Appeal.*]—In an action for wrongful dismissal, where the contract was for a yearly hiring, the defendant rested his defence wholly on the ground that the plaintiff left his service voluntarily. This the plaintiff denied. The employment of the plaintiff by the defendant for a year being admitted :—*Held*, that the onus of establishing his defence rested upon the defendant, and that he must fail if his defence was not substantiated :—*Held*, also, that an extremely slight preponderance of evidence was not sufficient to justify the finding that the plaintiff left the defendant's service voluntarily, when the plaintiff swore positively that he did not :—*Held*, also, that the trial Judge erred in treating the case as one in which the burden rested upon the plaintiff. Judgment below reversed on question of fact. *McInnes* v. *Ferguson*, 32 N. S. Reps. 516.

See WRIT OF SUMMONS, VI. 1.

IV. INJURY TO SERVANT—GENERALLY.

1. Cause of accident — *Evidence — Conjecture.*]—The respondent's husband, a skilled engineer, while employed in the appellants' establishment, in charge of a stationary engine, was accidentally killed. There was no one present at the time, and there was no evidence to indicate the cause of the accident :—*Held*, Lacoste, C. J., and Hall, J., *dissentientibus*, that the appellants being in fault, in not properly protecting the machinery by railings, it was for them to prove that the accident would have occurred even if the machinery had been properly protected. *Per* Lacoste, C. J., and Hall, J.: — Even where there is evidence of general negligence (which had not been established in the present case) the burden of proof is on the plaintiff to shew that the accident occurred as the result of such negligence, and mere conjecture or theory is not sufficient to constitute such proof. *Montreal Rolling Mills Co.* v. *Corcoran*, Q. R. 8 Q. B. 488. Reversed 26 S. C. R. 595.

2. Fire in building—*Death of servant—Order of foreman—Damages—Appeal.*]—A fire having broken out in a tobacco factory in which children were employed, the foreman on the highest floor of the building ordered the work-people, who had commenced to descend, to return to their places, crying out that there was no danger—in which he was mistaken. The smoke from the fire afterwards reaching this floor, the children there at work became alarmed and ran to a window. The respondents' daughter, one of these children, whether through fright or being pushed by her companions, threw herself out of the window and was killed. Those who remained easily escaped by the stairs or the lifts :—*Held*, that the primary cause of the child's death was the fact of the foreman hindering the work-people from descending, which they could easily have done, and, although the foreman had acted in good faith, he had committed an imprudence for which the appellant, the master, was liable.—That the foreman having thus placed the child in a perilous position, in which fright took away from her the use of her reason, or at least made her believe that she could save herself only by throwing herself out of the window, the appellant was liable.—The judgment of the Judge of first instance fixing the amount of damages cannot be set aside except for reasons which would justify the setting aside of the verdict of a jury. *Levi* v. *Reed*, 6 S. C. R. 432, followed. *Macdonald* v. *Thibaudeau*, Q. R. 8 Q. B. 449.

3. Negligence — *Cause of accident—Common employment.*]—To permit an unnecessary quantity of dynamite to accumulate in dangerous proximity to employees of a mining company, in a situation where opportunity for damage might occur from the nature of the substance or through carelessness or otherwise, is such negligence on the part of the company as will render it liable in damages for the death of an employee from an explosion of the dynamite, though the direct cause of such explosion may be unknown; Gwynne, J., dissenting :— *Held*, further, that, as the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions by fellow servants of the deceased could not exonerate the employees from liability for the negligence of a servant which may have led to the injury. *Regina* v. *Filion*, 24 S. C.

R. 482, and *Regina* v. *Grenier*, 30 S. C. R. 42, followed. *Asbestos and Asbestic Co.* v. *Durand*, 20 Occ. N. 195, 30 S. C. R. 285.

4. Negligence — *Damages—Death of child—Railway.*]—The omission to have a lock at a railway switch, not otherwise securely guarded, situate near a much travelled highway, is such negligence as to make those having control of the railway liable in damages for the death of their servants resulting from the switch becoming misplaced. In an action by a parent to recover damages for the death of his child there need not be evidence of pecuniary advantage derived from the deceased; it is sufficient if there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit to the parent in the future, capable of being estimated. *Rombough* v. *Balch—Green* v. *New York and Ottawa R. W. Co.*, 20 Occ. N. 60, 27 A. R. 32.

5. Negligence—*Defect in plant—Contractor—Owner.*]—Where the plaintiff, a workman, undertook to do certain work for the defendant by contract at a price agreed upon, and subsequently borrowed a ladder from the defendant to aid him in the performance of the work :—*Held*, that the defendant was not responsible for injury resulting to the plaintiff from the weakness of a screw in the ladder, it being the duty of the plaintiff, who was skilled in such matters, to examine the ladder and ascertain whether it was sufficiently strong for the purpose, before making use of it. *Larose* v. *Laforest*, Q. R. 17 S. C. 331.

6. Negligence—*Degree of care necessary.*]—The application of the principle that the responsibility of the employer is that of a *bon père de famille* requires at his hands care and protection against even the mistakes and thoughtlessness of the servant, in the performance of acts in the ordinary discharge of his duties. While the employer may not be responsible for the consequences of unusual or unnecessary acts of the workman, and while certainly he is not responsible for acts committed in violation of orders or in defiance of ordinary rules of self protection, a greater degree of prudence may be enforced against an employer in protecting his workman against possible dangers, than can be exacted from the workman. From the employer is expected the prudence of experienced judgment : from the workman, obedience only to express orders and general principles of safety and self protection. In the present case, therefore, where the wedge of a screw on a revolving shaft was left projecting near where the workman was employed, and his clothing caught thereon, the employer was held responsible although the accident might have been avoided by greater care on the part of the workman. *Matthews* v. *Bouchard*, Q. R. 8 Q. B. 550. Affirmed, 28 S. C. R. 580.

7. Negligence — *Foreman—Evidence—Finding of jury.*]—The plaintiff, while working for some contractors who were building a house, was injured through a fall caused by the giving way of part of the scaffolding of the house. The scaffold he was standing on consisted of a single plank about fifteen feet long, one end of which rested on a trestle, and the other on a stay formed of a plank nailed to two upright posts, forming a part of the main structure. The stay as originally fastened to the posts was perfectly secure, as the plank forming the stay rested on its edge on a cleat securely fastened to the posts by spikes, the stay itself being securely fastened to the posts by large spikes. The general superintendent of the defendants' works had been very explicit in directing the workmen that the stays should be put up and secured as this one had been. Two workmen however removed the stay for purposes of their own convenience about three o'clock on the 7th September, and raised it about a foot above the cleat and nailed it to the posts in a manner which rendered it dangerous. On the following morning, between eight and nine o'clock, the plaintiff and another being directed by the foreman to cut off the ends of two beams at the top of the third storey, the plank referred to was thrown across from the trestle to the stay; and the plaintiff mounting it the stay gave way and the injury happened :—*Held*, by the trial Judge, that there was no evidence of negligence on the part of the foreman. An appeal by the plaintiff from this decision was allowed with costs, and judgment ordered for the plaintiff for $500, the damages assessed by the jury, with costs, the Court holding that there was evidence sufficient to support the finding of the jury in answer to the third question, and that finding could not be interfered with or disregarded. *Kelly* v. *Davidson*, 20 Occ. N. 121, 304, 31 O. R. 521, 32 O. R. 8.

8. Precautions—*Warnings.*]—It is the duty of an employer to use means as safe as are practicable in the performance of his work. He has no right to use means which offer a constant danger to his employees, when other means, perhaps a little more expensive and a little slower in operation, would have avoided the danger. The employer is not relieved from responsibility by the fact that the workman did not comply with warnings, unless it be shewn at

the same time that such compliance would have avoided the danger. *Scanlan* v. *Detroit Bridge and Iron Works*, Q. R. 16 S. C. 264.

See LIMITATION OF ACTIONS, 6.

V. INJURY TO SERVANT — EMPLOYERS' LIABILITY ACT, B. C.

1. Jury — *Apparatus causing injury—New trial.*]—To entitle plaintiff to judgment in an action under the Employers' Liability Act, the jury's findings must shew that it was reasonably and practically necessary for him to use the apparatus causing the injury. Where the facts proved shew absence of such necessity a new trial will not be granted. *Davies* v. *Le Roi Mining and Smelting Co.* 7 Brit. Col. L. R. 6

2. Negligence—*Excessive damages.*]—In an action under the Employers' Liability Act the jury found that the defendants were guilty of negligence in not having a platform so fixed as to prevent drills which were thrown down from bounding into the tunnel, and that the plaintiff was unaware that drills were being thrown down when he was about to pass through the tunnel; and the jury assessed the damages at $3,000 :—*Held*, that the defendants were liable, but that the damages should be reduced to $500. *Pender* v. *War Eagle Consolidated Mining and Development Co.*, 7 Brit. Col. L. R. 162.

VI. INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT, ONTARIO.

1. Negligence — *Dangerous process—Want of warning.*]—The plaintiff, while employed in removing the cut pieces from a pair of shears worked by steam power, was struck by a flying piece of metal and severely injured. The machine was perfect of its kind, and it was not shewn that a screen or guard could have been used, and the plaintiff was aware that there was danger. The danger when steel was being cut was greater than when iron was being cut, and the accident happened when steel was being cut :—*Held*, that there should have been some warning that steel was about to be cut, and that this means of reducing the possible danger not having been adopted, the defendants were liable in damages as at common law :—*Held*, also, per Maclennan, J. A., that, as the foreman had been in the habit of warning the workmen when steel was to be cut, and had neglected to do so on this occasion, there was liability under the Workmen's Compensation Act. *Choate* v. *Ontario Rolling Mill Co.*, 20 Occ. N. 200, 27 A. R. 155.

2. Negligence—*Defect in machinery—Want of notice of accident.*]—A machine perfect in itself is, if applied to some purpose for which it is unfitted, defective within the meaning of s. 3 (1) of the Workmen's Compensation for Injuries Act, R. S. O. c. 160. To state in the defence that notice of the accident has not been given, and that the defendants intend to rely on that defence, is not sufficient. Formal notice must be given in accordance with the provisions of s. 14. *Cavanagh* v. *Park*, 23 A. R. 715, applied. *Hamilton* v. *Grovesbeck*, 19 O. R. 76, is not now law, owing to statutory changes. *Wilson* v. *Owen Sound Portland Cement Co.*, 20 Occ. N. 290, 27 A. R. 328.

3. Negligence — *Street railway—Control.*] — The motorman of a car running on an electric system is a "person who has the charge or control" thereof, within the meaning of s.-s. 5 of s. 3 of the Workmen's Compensation for Injuries Act, R. S. O. c. 160, and his employers are liable in damages to a fellow servant for injuries sustained while in discharge of his duty, owing to the motorman's negligence in passing too close to a waggon which is moving out of the way of the car. *Snell* v. *Toronto R. W. Co.*, 20 Occ. N. 224, 27 A. R. 151.

4. Negligence — *Superintendence—Defect in ways.*]—The plaintiff was a labourer employed by the defendants to carry mortar to masons, also employed by them, who were building a wall on the defendants' land. The work was being done under the superintendence of a foreman, who, after the wall had been built, directed the plaintiff and one mason to do the tuck-pointing next day. In order to enable the plaintiff to take the mortar to the mason at the foot of the outer face of the wall, the mason and the plaintiff made a gangway, of planks which had been used in the scaffolding, from the top of the wall to an adjacent building and thence to the ground, and, while the plaintiff was walking on the gangway with a load of mortar, an insecurely fastened plank gave way and he was injured:—*Held*, that the defendants were not liable at common law, the mason and the plaintiff being fellow workmen exercising their own judgment as to the proper means of accomplishing their object, and the planks being strong and sufficient for the purpose required if properly fastened:—*Held*, also, that there was no liability under the Workmen's Compensation for Injuries Act, the mason not being a person to whose orders the plaintiff, in respect of the

mode of carrying the mortar, was bound to conform, and the gangway not being a "way" within the meaning of the Act, or constructed by a person having, in regard to it, superintendence intrusted to him. *Ferguson* v. *Galt Public School Board*, 20 Occ. N. 397, 27 A. R. 480.

VII. Injury to Third Person by Servant.

Parent and child—*Negligence.*]—The doctrine of the liability of a master for his servant's negligence applies in the case of the implied relationship of master and servant sometimes existing between parent and child, but as in the case of master and servant so in that of parent and child there is no liability if at the time the negligent act is committed the child is engaged in his own affairs and not on the parent's behalf. The father of a lad of twenty, living at home, was held not liable, therefore, for an accident caused by the lad's negligence while driving, with the father's implied permission, the father's horses and carriage home from a shop to which the lad had gone to purchase, with money earned by himself, articles of clothing for himself. *File* v. *Unger*, 20 Occ. N. 348, 27 A. R. 468.

VIII. Secret Profits of Servant.

Commission — *Costs* — *Jus tertii.*]—Profits acquired by the servant or agent in the course of or in connection with his services or agency fall to the master or principal. The manager of a cold storage company, at the request of the company, undertook to advise a meat company as to some changes in their plant, and used his position of adviser to influence the purchase by the meat company of a new plant from the defendants, who had promised him a commission on any order they might receive through his assistance. This was not disclosed to his employers or the meat company:—*Held*, that the transaction was one in connection with his service as manager of the cold storage company, and he could not recover a commission from the defendants. The defendants having at first conceded the plaintiff's right to recover, and then paid the money to the cold storage company, taking a bond of indemnity, the action was dismissed without costs. *Jones* v. *Linde British Refrigeration Co.*, 20 Occ. N. 436, 32 O. R. 191.

MAYOR.

See Municipal Elections, II. 4.

MECHANICS' LIENS.

I. Manitoba Act.

II. Ontario Act.

III. Quebec Act — Builder's Privilege.

See Appeal, X. 4—Costs, IX. 7—Courts, II.—Principal and Surety, 1.

I. Manitoba Act.

61 V. c. 29 (Man.)—*Priorities—Lienholders—Mortgagees — Notice—Subrogation —Unpaid vendor—Defects in statement of lien registered — Costs — Counsel fees.*]—At the trial of an action under the Mechanics' and Wage-Earners' Lien Act, 61 V. c. 29 (Man.), which was not defended by the debtor, it became necessary to determine the respective rights and priorities as between the plaintiff, whose claim was for work and labour, another lienholder whose claim was for lumber and other materials supplied at different dates, and several mortgagees. These parties had been served pursuant to s. 32 and s. 27 (2) of the Act with notice of the trial, but had not been otherwise made parties to the action:—*Held*, that, although an account for materials supplied may consist of items for different lots supplied at different dates on separate and distinct orders, the lien filed within the required time after the delivery of the last lot will be good to cover all the orders if given in pursuance of a general arrangement previously entered into. *Morris* v. *Tharle*, 24 O. R. 159, followed. *Chadwick* v. *Hunter*, 1 Man. L. R. 39, distinguished. —2. The claims of subsequent incumbrancers and other lienholders may be disposed of at the trial without their being made parties to the action, and although the notice of trial has been served after the time limited for bringing the action. *Cole* v. *Hall*, 13 P. R. 100, followed.—3. The lienholder who registers his lien in time has priority, from the date of the commencement of the work or from the placing of the materials, over every conveyance, mortgage, or charge made thereafter, although registered first, and such priority is not affected by s. 11 of the Act, which applies only to payments or advances made subsequently to the taking effect of the lien under conveyances or mortgages otherwise having priority.—4. The effect of s. 17 of the Act is, that only substantial compliance with the directions as to the contents of the claim and the registration of it is required, and no failure in such compliance, in however substantial a degree, is to invalidate the lien unless some other party is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.—5. The lien

for materials supplied as against a mortgage has priority over the mortgage only to the extent of the materials placed on the ground before the mortgage money was advanced.—6. Under s. 11, if a mortgagee has notice in writing of the fact that there is an indebtedness for which a lien may be claimed, that is *prima facie* notice of the lien itself, and he cannot claim priority for moneys advanced after such notice.—7. The first mortgagee having applied his last advance in payment of the purchase money of the lots to the unpaid vendor, who then conveyed the land in fee to the defendant owner, and, having thus secured the title to the property, claimed to be entitled to be subrogated to the position of the original vendor in respect of such purchase money; but, having had actual notice of one of the liens and constructive notice of the other before making this payment, following *Parry* v. *Wright*, 1 Sim. & Stu. 369, 5 Russ. 142, that he could not have priority over either lienholder for such advance. *Brown* v. *McLean*, 18 O. R. 533, and *Abell* v. *Morrison*, 19 O. R. 672, distinguished.—8. Counsel fees actually paid are to be included among the "actual disbursements" referred to in s. 37 of the Act, whether or not the counsel is a solicitor or a partner of a solicitor in the cause. *Magurn* v. *Magurn*, 10 P. R. 570, followed. *Robock* v. *Peters*, 20 Occ. N. 262, 421, 13 Man. L. R. 124.

II. Ontario Act.

1. "Notice in writing" to owner —*Letter.*]—The claimants of a mechanics' lien for materials wrote to the owner a letter asking him, when making a payment to the contractor "on the Lisgar street buildings"—the property on which the lien was asserted—to "see that a cheque for at least $400 is made payable to us on account of brick delivered, as our account is considerably over $700, and we shall be obliged to register a lien if a payment is not made to-day:"—*Held*, Meredith, J., dissenting, a sufficient "notice in writing" of their lien, under s.-s. 2 of s. 11 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. c. 153. *Craig* v. *Cromwell*, 20 Occ. N. 255, 32 O. R. 27.

2. "Owner"—*Relation to contractor.*] —A person is not an "owner," within the meaning of s.-s. 3 of s. 2 of the Mechanics' Lien Act, R. S. O. c. 153, and as such liable in mechanics' lien proceedings for work done or materials placed upon land in which he has an interest, unless there is something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged. Mere knowledge of, or consent to, the work being done or the materials being supplied, is not enough; there must be a request, either express, or by implication from circumstances to give rise to the lien. *Gearing* v. *Robinson*, 20 Occ. N. 302, 27 A. R. 364.

3. Trial — *Procedure — Parties—Mortgagee — Materials on land—Conversion.*]— The procedure for the trial of an action under the Mechanics' and Wage-Earners' Lien Act, R. S. O. c. 153, is the ordinary procedure of the High Court, which is not affected by ss. 35 and 36 of the Act; and therefore a mortgagee against whom relief is sought must be made a party to the action within the time limited by s. 24, s.-s. 1. Materials were placed on the land by the owner thereof and paid for by the mortgagee, to be used in the construction of buildings being erected thereon, but not actually incorporated therein. The materials were taken by the owner to a planing mill to be planed for placing in the buildings, and having been left there for some time, and storage charges incurred, the owner sold them to the mill-owner:—*Held*, *per* Meredith, C. J., that no lien attached on such materials, the incorporation thereof in the building being an essential element. *Per* Rose and MacMahon, JJ., that such lien would attach, notwithstanding the absence of such incorporation, but, there having been a conversion, no relief could be granted, for there is nothing in the Act which enables the Court to assess damages which could be made applicable to lienholders. *Larkin* v. *Larkin*, 20 Occ. N. 256, 375, 32 O. R. 80.

4. Twenty per cent. reserve—*Payment before thirty days.*]—All work on a building was finished on the 11th August, 1899. On the 14th August, 1899, four workmen, whose wages remained unpaid, and who were entitled to liens for the amount, threatened to register their liens unless paid at once. The owner thereupon paid the amount; and afterwards treated the same as deducted from the twenty per cent. retained under R. S. O. c. 153, s. 11, and proceedings having been commenced, the owner paid the balance of the twenty per cent. into Court. The balance so paid in, however, was more than sufficient to pay all remaining wage-earners in full:—*Held*, that, under the above circumstances, the owner was justified in making the payments out of the twenty per cent. before the expiration of the thirty days mentioned in the Act, and could not be required to pay the sum over again into Court. By making such a payment, however, the owner takes the responsibility of shewing that he has placed the other lienholders in no worse position by his action, as had

been shewn in the present case. *Torrance* v. *Cratchley*, 20 Occ. N. 74, 31 O. R. 546.

III. QUEBEC ACT — BUILDER'S PRIVILEGE.

1. Claim of lien — *Rights against owner — Proceedings against "debtor."*]— The plaintiff, having contracted to furnish materials to a builder to be used in the construction of a building, gave written notice to the defendant, owner of the land, under Art. 2013*g*, C. C., and subsequently registered a memorial that he had furnished materials to the amount stated, and he then notified the defendant of such registration. The present action was brought against the owner of the immovable more than three months subsequently, asking that he be condemned to pay the amount. No proceedings had been taken against the purchaser of the materials:—*Held*, that the privilege created in favour of the supplier of materials, and his recourse against the owner of the land, by the registration of the memorial, lapse unless legal proceedings are taken, within three months following the notice, to have the debtor condemned,—by the "debtor," in Art. 2013*i*, being meant the purchaser of the materials. *Lalonde* v. *Labelle*, Q. R. 16 S. C. 573.

2. Material man — *Action—Time.*]— An action in which a material man claims from the contractor the price of materials furnished by him, and asks against the owner of the land upon which buildings have been erected with the plaintiff's materials that the land shall be declared to be charged with the amount of the plaintiff's claim unless the owner prefers to pay the price of the materials, will be dismissed upon demurrer by the owner if it does not appear that the plaintiff has begun his action within the three months following the notice mentioned in Art. 2013*g*, C. C. *McLaren* v. *Loyer*, 3 Q. P. R. 60.

3. Material man—*Notice to owner—Pleading.*]—Under the provisions of ss. 2 and 3 of 57 V. c. 46 (Q.), and before the amendment of 59 V. c. 42, s. 2, a material man ought, in order to preserve his lien, in the three days after the registration of the memorandum of his claim, to give a written notice to the owner or his agent. Where the declaration did not allege that the notice had been given, a demurrer was allowed. *Paquette* v. *Houston*, 2 Q. P. R. 558.

4. Material men — *Priorities.*]—Although the right of the supplier of materials is called in Art. 2013 (*l*), C. C., (59 V. c. 42), in the French version "un droit d'hypothèque" and in the English version "a hypothecary privilege," the right is nevertheless of the nature of a privilege and not of the nature of a hypothec, and all suppliers for the same building who have availed themselves of the privileges of the Article and registered their claims, rank concurrently. *Jamieson* v. *Charbonneau*, Q. R. 17 S. C. 514.

5. Parties — *Owner—Debtor.*]—In an action against the purchaser of land for a declaration that it is bound by a mechanics' lien registered thereon and for realization of such lien by a sale, it is not necessary that the vendor, who is personally liable for the debt sought to be charged, shall be made a party. *Pouliot* v. *Pelletier*, 3 Q. P. R. 236.

6. Prescription—*Statute—Amendment—Claim of lien — Registration—Notice.*]— *Held*, affirming the judgment in Q. R. 14 S. C. 473, that where a privilege, both by the pre-existing law and by the statute amending the same, is made to depend upon and to date from its registration, the effects of the registration of such privilege effected only after the coming into force of the amending statute are governed, as to the duration of the privilege and the time by which it is prescribed, by the provisions of the amending Act: consequently, the prescription applicable to a builder's privilege which was only registered after the coming into force of the amending Act 59 V. (Q.) c. 42, is that of one year from the date of the registration, although the work for which the privilege was sought was done before the amending Act came into force.—2. In order to obtain the hypothecary privilege of a supplier of materials under Art. 2013*l*, C. C. (59 V. c. 42), the formalities prescribed by law, as to notice to the proprietor, must be complied with, and the memorial or *bordereau* mentioned in Art. 2103, C. C., must state the cost of the materials furnished. *Hochelaga Bank* v. *Stevenson*, Q. R. 9 Q. B. 282; [1900] A. C. 600.

MEDICAL PRACTITIONER.

1. "Practising"—*Choice of remedies—Statutes.*] — The statutes against the illegal practice of medicine are for the benefit of the public, and should be interpreted and applied as such.—2. The oath of the father of the child who has received treatment ought to prevail over that of the defendant.—3. It is practising medicine illegally to engage with a man to treat his daughter.—4. Illegal medical treatment consists especially in the choice of remedies applicable to the

disease.—5. The fact that the remedies are patented does not make in favour of the defendant. — 6. The choice of remedies necessary on the part of the defendant, which he himself sells as well, indicates that he does not sell purely and simply, but practises medicine illegally.—7. The simple profit which the defendant makes upon the sale of his remedies may be the consideration which he obtains for the practice of medicine. *College of Physicians and Surgeons of Quebec* v. *Blake*, 2 Q. P. R. 567.

2. "Practising" — *Diagnosis—Evidence—Informers.*]—One who, not being a registered physician, sells remedies to a person who comes to him and asks for a remedy for a disease which he says he has, but without diagnosing such disease, is not guilty of illegally practising medicine.—The testimony of persons who are engaged, on condition of sharing in the penalty fixed by law, to make a case against a person who is suspected of illegally practising, is such testimony as will be viewed with suspicion, and will not be regarded if it is contradicted by the oath of the accused. *College of Physicians and Surgeons of Quebec* v. *Tucker*, Q. R. 17 S. C. 70.

3. "Practising"—*Diagnosis—Ontario Medical Act.*]—Diagnosing only, or professing to diagnose, without prescribing a remedy or medicine, is not a "practising of medicine." *Regina* v. *Howarth*, 24 O.R. 51, and *Regina* v. *Coulson*, 27 O. R. 59, distinguished. Conviction for practising medicine without registration quashed, where the evidence shewed that the alleged practising consisted in asking the complainant what his symptoms were and then rubbing his body and suggesting that he was cured. *Regina* v. *Valleau*, 20 Occ. N. 310.

4. Services abroad—*Illegal practising—Payment for.*]—A contract made by a physician and surgeon duly qualified by the laws of the Province of Quebec, where he has his domicil, to render professional services in the State of Vermont, by the laws of which State he is prohibited from practising, is illegal, and he cannot recover his charges for such services before the Courts of this Province. *Rugg* v. *Lewis*, Q. R. 17 S. C. 206.

See CONTRACT, I. 5, 6—LIMITATION OF ACTIONS, 5.

MERCHANT SHIPPING ACT.

See SHIP, 5.

MERGER.

Equitable right to charge—*Subsequent acquisition of fee.*]—In taking the accounts under the judgment reported 27 O. R. 511 and 24 A. R. 543, it was held that the defendant Lye had no right to an equitable charge, in priority to the plaintiff's claim, for sums paid by Lye to prior incumbrancers before the conveyance of the land to him, his potential equity not bringing him within ss. 8, 9, and 10 of R. S. O. c. 121, and there being no evidence of intention to preserve the right to the equitable charge. *Armstrong* v. *Lye*, 20 Occ. N. 203, 27 A. R. 287.

MINES AND MINERALS.

I. ADVERSE CLAIMS.
II. OTHER CASES.

I. ADVERSE CLAIMS.

1. Action — *Affidavit—Plan—Extension of time.*]—The time for filing affidavit and plan in an adverse action under the Mineral Act may be further extended on an application made after the lapse of the time fixed by a previous order. *Noble* v. *Blanchard*, 7 Brit. Col. L. R. 62.

2. Adjoining claims—*Boundary.*]—Two persons having located mining claims in British Columbia near the United States boundary line, it turned out that a piece of ground was included in both, and an action was brought to determine the title thereto. On the trial it was proved and conceded that the initial post of the defendant's claim was south of the boundary line, and so in foreign territory:—*Held*, affirming the judgment in 6 Brit. Col. L. R. 531, that, in consequence of this situation of the defendant's initial post, his location was utterly void. *Madden* v. *Connell*, 20 Occ. N. 30, 30 S. C. R. 109.

3. Bill of sale — *Fraud.*]—W. sold certain mineral claims, called the Big Four group, to A., who sold in turn to the defendants, after which W., as agent for the plaintiff, located a fraction between two of the claims in the plaintiff's name:—*Held*, that defendants had no right to the fraction, in the absence of proof of fraud by W. and that the plaintiff was a party thereto; and that the defendants could not invoke against the plaintiff a statement in a bill of sale from H. to W. that the end of the two claims between which the fraction in question was located, adjoined each other. *Gibson* v. *McArthur*, 7 Brit. Col. L. R. 59.

4. Certificate of improvements—*Crown grant—Rectification.*]—An application was made to the Chief Commissioner of Lands and Works for a rectification of the Crown grant of certain mineral claims, and was opposed by persons who had obtained a certificate of improvements covering a portion of the ground included in the grant :—*Held*, that the applicant was entitled to have the grant rectified, notwithstanding the certificate :—*Held*, also, that the holder of a certificate of improvements is not bound to adverse any subsequent applicant for a certificate. *In re "American Boy" Mineral Claim*, 20 Occ. N. 320, 7 Brit. Col. L. R. 268.

5. Certificate of improvements—*Fraud—Remedy.*]—An adverse claimant, who neglects to take the remedy provided by s. 37 of the Mineral Act, cannot sue to set aside a certificate of improvements on the ground of fraud. *Semble*, that under such circumstances the Crown alone is entitled to sue. *Hand* v. *Warren*, 7 Brit. Col. L. R. 42.

6. Failure to record transfer — *Right of locator.*] — In May, 1897, B. located and recorded the "May Day" claim, and, six days after location, conveyed a half interest to the defendant by a bill of sale, which was not recorded till April, 1898. B.'s free miner's certificate lapsed in July, 1897, and in October, 1897, the plaintiff, a free miner, re-located the "May Day" as the "Equalizer" claim:—*Held*, that the defendant's title should prevail against the plaintiff's. *Grutchfield* v. *Harbottle*, 20 Occ. N. 395, 7 Brit. Col. L. R. 186, 344.

7. Onus—*Duty of counsel—New trial.*]—In adverse proceedings the onus of proof is on the adverse claimant, who has to give affirmative evidence of his own title. Counsel for the adverse claimant, in deference to a remark of the trial Judge, did not complete the proof of his own title :—*Held*, that he should have pressed to be allowed to complete it, but under the circumstances there should be a new trial. *Caldwell* v. *Davys*, 7 Brit. Col. L. R. 156.

8. Staking — *Evidence—Certificates—Copies of documents.*]—In adverse proceedings where it is not established with reasonable certainty: (1.) that the ground was properly staked, (2.) that, assuming the ground had been properly staked, it was identical with the ground mentioned in the record: and the defendant shews title and produces certificates of work for several years, judgment will be given in favour of defendant. Before a substituted certificate will be admitted in evidence, there must be proof of loss of the original. Conditions of the admissibility of a mining recorder's certificate as to issue of free miner's license and as to issue of certificates of work considered. Copies of certain re corded instruments held admissible without proof of originals. *Pavier* v. *Snow*, 7 Brit. Col. L. R. 80.

9. Title — *Overlapping—Measurements—Abandonment and re-location.*]—In adverse proceedings if the plaintiff wishes to attack the defendant's title he must attack it while proving his own title and not wait till rebuttal. The plaintiff must shew the measurements of the ground in dispute in order to prove overlapping of claims. An affidavit by a re-locator that the ground is unoccupied may be regarded as a statutory abandonment of his former claim. *Dunlop* v. *Haney*, 7 Brit. Col. L. R. 1, 305.

10. Unoccupied ground — *Overlapping—Abandonment.*]—In adverse proceedings the party locating over a claim alleged to have been abandoned must produce clear evidence of abandonment, and it is not enough for this purpose to rely upon the non-production of certificates of work.—*Semble*, a locator cannot after abandonment by a prior locator rest on a location made before such abandonment, but must relocate. *Cranston* v. *English Canadian Co.*, 7 Brit. Col. L. R. 266.

II. Other Cases.

1. Certificate of improvements—*Fraud—Application of Minister of Mines.*]—In an action by the Attorney-General to set aside a certificate of improvements, on the ground that it was obtained by fraud, the fraud alleged was a statement in an affidavit of the defendant's agent, sworn on the 10th August, 1899, that the defendant was in undisputed possession of the "Pack Train" mineral claim. On the 10th August, 1899, an action was pending as to the title of the "Pack Train" claim, and judgment was not delivered till the 11th August, 1899, in favour of the defendant. It was after the 11th August when the affidavit reached the Gold Commissioner :—*Held*, not fraud within s. 37 of the Mineral Act. The application of the Minister of Mines under s. 10 of th Mineral Act Amendment Act, 1899, need not be in writing. *Attorney-General* v. *Dunlop*, 20 Occ. N. 422, 7 Brit. Col. L. R. 312.

2. Conveyance of land—*Effect of—Precious metals.*]—*Held*, that where the precious metals have been passed out of the Crown to a grantee, a conveyance

of the land by the latter to a third person in the ordinary form will pass the precious metals, although not specially mentioned. *In re St. Eugene Mining Co.*, 20 Occ. N. 362, 7 Brit. Col. L. R. 288.

3. Location—*Record.*]—Two strips of land unconnected with each other, although within the statutory limit of 1,500 feet, cannot be embraced in one location and record. *Dart* v. *St. Keverne Mining Co.*, 7 Brit. Col. L. R. 56.

4. Mine owner—*Negligence—Accident to miner—Statutory duty.*]—Section 25 of the Inspection of Metalliferous Mines Act was not intended to impose unreasonable burdens upon the mine owner, and therefore he is only required to use reasonable precaution against accidents to miners. *McDonald* v. *Canadian Pacific Exploration Co.*, 7 Brit. Col. L. R. 39.

5. Mining company — *Judgment against—Wages — Directors — Manager — Dismissal of action.*]—A manager of a company is not a labourer, servant, or apprentice within the meaning of s. 8 of the Ontario Mining Companies Incorporation Act, R. S. O. c. 197. An action brought against two directors of a mining company by such manager, who had recovered a judgment against the company for wages due him and payments made on their behalf to labourers and servants, and had subsequently obtained assignments of the amounts paid, was dismissed on a motion under Rule 616, on the ground that the action in which judgment was recovered was not such an action as is contemplated by s. 8. *Herman* v. *Wilson*, 20 Occ. N. 382, 32 O. R. 60.

See CONSTITUTIONAL LAW, 9 — CONTRACT, III. 4—PROHIBITION, I. 1—RES JUDICATA, 1—TRIAL, VI1.

MINING COMPANY.

See MINES AND MINERALS, II. 5.

MISDIRECTION.

See CONTRACT, II. 1—DEFAMATION, 6—STREET RAILWAYS, II. 1.

MISNOMER.

See WRIT OF SUMMONS, I.

MISTAKE.

See AFFIDAVIT, 3—APPEAL, I. 2—EXECUTION, III. 7—LIMITATION OF ACTIONS, 8 — MUNICIPAL CORPORATIONS, IX. 2 — MUNICIPAL ELECTIONS, I. 12.

MISTAKE OF TITLE.

See CROWN, IV. 3.

MONEY HAD AND RECEIVED.

See CONTRACT, IV. 3.

MONOPOLY.

See CONSTITUTIONAL LAW. 4.

MORTGAGE.

I. COVENANT FOR PAYMENT.
II. FORECLOSURE, SALE, REDEMPTION.
III. FRAUD OF SOLICITOR.
IV. OTHER CASES.

See APPEAL, X. 4—COMPANY, II. 5, III. 2—CROWN, IV. 4—ESTATE — EVIDENCE, II. 3, VIII.—EXECUTORS AND ADMINISTRATORS, 5—GIFT, 3 — INSURANCE, III. 5—JUDGMENT, IV. 2—LANDLORD AND TENANT, IV. 3, VI. 4—LIMITATION OF ACTIONS, 12 — MECHANICS' LIENS, I., II. 3—PARTICULARS, II. 10—RAILWAYS AND RAILWAY COMPANIES, V. 1—RECEIVER, 3—REGISTRY LAWS, I. 1, IV.—SET-OFF, 1.

I. COVENANT FOR PAYMENT.

1. Action on covenant — *Sheriff's sale—Redemption.*]—Defendant mortgaged certain real estate to A., and afterwards conveyed the equity of redemption to E. P. A., who conveyed it to L. A. assigned the mortgage to the plaintiff. R., who foreclosed without making defendant a party to the proceedings. At the sheriff's sale plaintiff purchased the property for an amount less than the amount due for principal and interest on the mortgage, and afterwards conveyed it to F. Plaintiff having sued on the covenant contained in the mortgage, to recover from defendant the full amount due, deducting the proceeds of the sheriff's sale:—*Held*, following *Kinnaird* v. *Trollope*, 39 Ch. D. 636, *Almon* v. *Busch*, Ritchie's Eq. Dec., and *Miller*

v. *Thompson*, unreported, that the plaintiff could only sue for the amount by which the proceeds of the sheriff's sale fell short of the amount due on the mortgage on giving defendant a further opportunity of redeeming, and that, as this could not be done, the property having been disposed of to a stranger, there should be judgment for defendant. *Kenny* v. *Chisholm*, 19 N.S. Reps. 497 (affirmed on appeal to the Supreme Court of Canada) distinguished. Meagher, J., dissented. *Ryan* v. *Caldwell*, 32 N. S. Reps. 458.

2. Conveyance of equity of redemption—*Expropriation — Mortgagor—Notice.*]—A mortgagor who has conveyed away his equity of redemption is not entitled to notice of expropriation proceedings taken by a railway company with regard to part of the mortgaged lands; and, therefore, the absence of such notice does not constitute any defence to an action brought against him by the mortgagee on a covenant to pay the mortgage money. *Farr* v. *Howell*, 20 Occ. N. 278, 31 O. R 693.

3. Release—*Dealings between mortgagee and assignee of equity.*]—The relations which exist among mortgagee, mortgagor, and assignee of the land who has agreed to pay the mortgage, are not those which obtain among creditor, surety, and principal debtor. *Aldous* v. *Hicks*, 21 O. R..95, approved. Nor should the doctrine of discharge applicable to the case of an ordinary surety be extended to the case of a mortgagor where no actual prejudice has arisen. So long as the covenant to pay endures, the mortgagor is liable to pay when sued by the mortgagee; his equitable right is, upon payment, to get the land back, or to have unimpaired remedies against his assignee if he has sold the land; and if those rights can be exercised by him at the time he is sued, it is immaterial that at some previous time there was such dealing between his assignee and the mortgagee as would then have interfered with such rights. *Mathers* v. *Helliwell*, 10 Gr. 173. explained. Dictum of Maclennan, J.A., in *Trust and Loan Co.* v. *McKenzie*, 23 A. R. 167, dissented from. *Barber* v. *McCuaig*, 24 A. R. 492, 29 S. C. R. 126, followed. *Forster* v. *Ivey*, 20 Occ. N. 402, 32 O. R. 175. (See, also, *Watson* v. *Bell*, 32 O. R. 181*n*.)

See RES JUDICATA, 2.

II. FORECLOSURE, SALE, REDEMPTION.

1. Counterclaim—*Action for redemption—Necessity to ask foreclosure.*]—Action to set aside certain deeds, and for a declaration that certain mortgages were paid off, or for redemption. The defence denied all the material allegations of the statement of claim, and the counterclaim was for foreclosure in respect of the mortgages mentioned. The counterclaim was objected to as unnecessary and embarrassing, and because the defendant, a mortgagee in possession, had not stated his willingness to account:—*Held*, that it was not absolutely necessary for the defendant to counterclaim for foreclosure in respect of the mortgages, which the plaintiff contended were paid off and should be released; for when the plaintiff fails in an action for the redemption of a mortgage the defendant is entitled to have a decree of foreclosure. But here the plaintiff's claim covered other matters and his claim for redemption was only in the alternative. If the plaintiff should partly succeed in his suit and abandon his alternative claim, it was possible that the defendant might have a good deal of difficulty in getting an order for foreclosure without another action, and he should not be compelled to take this risk. The counterclaim was not embarrassing to the plaintiff. It raised the same issues as were raised by the plaintiff. *Robert* v. *Miller* (No. 3), 20 Occ. N. 411. See also *Girardot* v. *Welton*, 20 Occ. N. 231, 257, 19 P. R. 162, 201.

2. Death of defendant after decree—*Right of redemption before confirmation of sale — Necessity for revivor.*] — While the lands were under advertisement of sale in pursuance of the decree of foreclosure and sale, which was in the usual form, the defendant died intestate. The plaintiff did not take any step to revive or continue the action, but proceeded with the sale as if the death had not taken place, and upon the sale purchased the property:—*Held*, that there is this distinction between the Nova Scotia decree and the English final order, that under the former the right of redemption exists absolutely pending the sale and final confirmation thereof, while under the latter no such absolute right exists: — *Held*, further, that the father of the deceased defendant could have exercised the only right that passed to him upon his son's death without being a party to the suit, unless the plaintiff refused to recognize his right, when he would need to ask the aid of the Court. The plaintiff would at his peril refuse him the right to redeem:—*Held*, further, that where a judgment of foreclosure and sale makes no provision as to a deficiency, the death of the mortgagor does not render necessary an application to revive. No claim for deficiency could be found on examination of the papers in this case.

Alward v. *Lewis*, [1891] 2 Ch. 81, distinguished. *Stubbings* v. *Umlah*, 20 Occ. N. 357.

3. Mortgagee in possession—*Account of rents—New day—Final order—Rights of purchaser after decree—Parties—Power of sale.*]—Mortgagees had been in possession before action for foreclosure. In such action, after decree and report fixing a day for redemption, the defendants applied for a new day, when the plaintiffs stated on affidavit that sums paid by them for taxes and costs more than exhausted the rents received since the date of the report:—*Held*, that the statement of the plaintiffs was insufficient: see Rule 387:—*Held*, also, that a purchaser who has purchased during the pendency of foreclosure proceedings, and whose rights are expressly subject to the termination of the proceedings by a final order of the Court in favour of the mortgagee, stands in a different position from one who comes in for the first time after a final order has been made, and is more readily made subject to the discretion of the Court to open the foreclosure. *Campbell* v. *Holyland*, 7 Ch. D. 166, and *Johnston* v. *Johnston*, 9 P. R. 259, followed. *Gunn* v. *Doble*, 15 Gr. 655, distinguished. In this case the mortgagors were in no default, the slightest examination of the proceedings on the part of the purchaser would have shewn him that the mortgages had never been properly foreclosed, and that no day had ever been fixed for the payment of the balance due the mortgagees. But he did not even ask whether a final order had been obtained, which was the condition upon which his sale was to be carried out:—*Held*, therefore, that the mortgagors had clear rights to redeem; and, having come in promptly for relief and taken vigorous steps to assert their rights, they were entitled to have the final order of foreclosure set aside, a new account taken and a new day fixed, and to redeem both as against the plaintiffs and B., for which purpose the latter should be added as a party:—*Held*, lastly, that the sale to B. was not, under the circumstances, sustainable under the power of sale contained in the plaintiffs' mortgage. *Kelly* v. *Imperial Loan Co.*, 11 S. C. R. 516, distinguished. *Supreme Court of the Independent Order of Foresters* v. *Pegg*, 20 Occ. N. 400, 19 P. R. 254.

4. Parties — *Administrator.*]—Subsequently to the making of a mortgage the original mortgagor had assigned the equity of redemption in the mortgaged premises to F. in trust to pay the creditors of the mortgagor, who had become insolvent. In an action by the mortgagee for foreclosure the administrator of the estate of F. was made the defendant:—*Held*, having regard to s. 19 of the Trustee Act, as amended in 1887, that the administrator was the proper party defendant. *Williams* v. *Brown*, 20 Occ. N. 419.

5. Second mortgage — *Pleading—Defence.*]—To an action brought by a first mortgagee for foreclosure, the defendants, purchasers of the equity of redemption, pleaded that after the making of the plaintiff's mortgage, the mortgagor made a second mortgage of the same lands, which was still outstanding and unpaid. The plaintiff applied to strike out the defence, under Order XXV., Rule 4. Ordered that the defence should be struck out. *Williams* v. *Morse*, 20 Occ. N. 418.

6. Subsequent incumbrancer—*Second suit—Costs.*] — Where a first mortgagee has commenced a foreclosure suit, and has obtained an order for foreclosure and sale, a second order for foreclosure and sale will not be granted to a second mortgagee in a second action in respect of the same lands. Such an order is unnecessary and oppressive. The second mortgagee's course is to protect his rights at the sale held under the first order. The second mortgagee is not entitled to add to his claim the costs of his foreclosure suit. *Wentworth* v. *Walsh*, 20 Occ. N. 340; *Grant* v. *Walsh*, *ib.* 341.

III. Fraud of Solicitor.

1. Authority — *Alteration in deed.*]—*Held*, upon the evidence, that the solicitor for the mortgagors had authority to receive from the mortgagee the mortgage money on their behalf:—*Held*, also, that the proper conclusion from the evidence was, that the name of the plaintiff as mortgagee was written in the mortgage at the time of its execution. *Brockbank* v. *Holmes*, 98.

2. Payment of mortgage—*Fraudulent assignment — Liability.*]—The plaintiff, for the purpose of raising a portion of the purchase money on a contemplated purchase of land, mortgaged lands then owned by him to the defendant C., the money being received by a solicitor who acted for both parties. The purchase not having been carried out, the plaintiff asked to have the mortgage discharged, whereupon the solicitor, who had misappropriated the moneys, fraudulently procured from the mortgagee an assignment of the mortgage to himself, which he assigned to the defendant P., who advanced the money thereon in good faith and without any knowledge of the fraud:—*Held*, that the plaintiff was entitled to a reconveyance of the property

released from the mortgage, and that the loss must be sustained by the defendant P., who took nothing under the assignment to him, for, the mortgage being paid off, the solicitor acquired no beneficial interest, being at most but a trustee of the legal estate, and he could pass no higher or better title to his assignee. *McCormick* v. *Cockburn*, 20 Occ. N. 178, 31 O. R. 436.

IV. Other Cases.

1. Execution creditors — *Sale—Surplus—Lien notes.*]—A part owner of a farm joined in promissory notes as surety for the purchaser of a machine, and also gave a lien on his share of the land as further security. Subsequently his interest passed to his co-owner, of whom the plaintiffs were execution creditors under judgments subsequent to the lien. The defendants, being mortgagees of the whole farm prior to the lien, afterwards sold under their power of sale, and out of the proceeds paid off the lien, and the notes were assigned in 1894 by them to an execution creditor subsequent to the plaintiffs, who held them till 1898, and then sued on the notes without result, as the maker had become insolvent. It was shewn that if the maker had been sued in 1895, by which time the notes had become payable, the amount of them would have been recoverable:—*Held*, that the notes were not paid by the application of the proceeds of the sale in discharge of the lien, at a time when they had not matured, the payment not having been made by the party primarily liable, the lien being given as a security only, and that the defendants should have secured the notes for the creditors generally, and were bound to account to the execution creditors for the amount paid in respect of them to the vendors of the machine, though under the circumstances without interest. *Glover* v. *Southern Loan Co.*, 20 Occ. N. 66, 31 O. R. 552.

2. Municipal land—*Privilege—Realty — Description — Aqueduct.*]—An aqueduct constructed upon land constitutes a surface right annexed to the land, and can, therefore, be mortgaged. — 2. Constructions upon the municipal domain, by virtue of a privilege granted by the council, are of the nature of realty for the time that the privilege lasts.—3. The designation of the mortgaged property is sufficient if the creditor has not been led into error by such designation. *Garant* v. *Gagnon*, Q. R. 17 S. C. 145.

MOTION.

1. Affidavit — *Dismissal.*]—A motion which is not accompanied by the affidavit required by Art. 47 of the Rules of Practice, the facts alleged being denied by the opposite party, will be dismissed with costs. *Bédard* v. *Bayard*, 3 Q. P. R. 194.

2. Affidavits in reply — *Service — Time.*]—Affidavits to be read in reply were served on the day preceding the argument. Objection being taken to the sufficiency of the service:—*Held*, that the words "those used by applicant in reply not less than one day" in the General Rule of Hilary Term, 1890, mean one *clear* day; and the service was insufficient. Time for service extended and cause allowed to stand for a later day. *Ex p. Price*, 20 Occ. N. 86.

3. Rule nisi — *Necessity for.*] — The proceedings in this case were brought before the Court by writ of *certiorari* granted by consent. No rule to quash the order removed into Court was moved for. The cause was entered on the Crown paper by consent. The Court refused to hear the argument until a rule to quash had been regularly moved for and taken out. *Regina* v. *Wilkinson—In re Restigouche Salmon Club*, 20 Occ. N. 86.

MUNICIPAL CORPORATIONS.

I. Administration of Justice.
II. Arbitration and Award.
III. Bridges.
IV. By-laws.
V. Common.
VI. Contracts.
VII. Councillors.
VIII. Drainage.
IX. Expropriation.
X. Local Improvements.
XI. Markets.
XII. Public Buildings.
XIII. Resolutions.
XIV. Sewers.
XV. Transient Traders.
XVI. Waterworks.

See Appeal, VIII., X. 5—Assessment and Taxes — Constitutional Law, 3, 6—Mandamus, 2—Way.

I. Administration of Justice.

1. Police magistrate — *Office — Stationery.*] — The police magistrate of a

town cannot require the corporation to provide facilities for the transaction of business not strictly appertaining to his office of police magistrate, such as business relating to an adjoining county of which he is a justice of the peace, nor is he entitled to a private office in addition to a public one. It is sufficient if a suitable room or chamber for a police office is provided in any building belonging to the municipality (in this case the council chamber), although by doing so the hours for the transaction of police business may be limited.—A municipal corporation is liable to a police magistrate for a claim for stationery, although extending beyond a year. *Mitchell* v. *Town of Pembroke*, 20 Occ. N. 70, 31 O. R. 348.

2. Special services — *Detection of crime—Accounts.*]—The gist of s. 12 of R. S. O. c. 101 is to empower a warden and county attorney to authorize any constable or other person to perform special services not covered by the ordinary tariff, which are, in their opinion, necessary for the detection of crime, or the capture of persons believed to have committed serious crimes, and to do so upon the credit of the county corporation, and so to render them liable for the payment for such special services; and the liability may attach whether the amount is certified by the warden and county attorney, as required by the said section, or not. *Stills* v. *County of Lennox and Addington*, 20 Occ. N. 101, 31 O. R. 512.

II. Arbitration and Award.

1. Application to set aside award —*Time—Publication — Arbitrator—Oath — Lowering grade of highway — Compensation.*]—The six weeks allowed by s. 465 of the Municipal Act, R. S. O. c. 223, for an application to set aside an award, run from the publication *to the parties* of the award. The failure of the arbitrator to take the oath required by s. 458 of the same Act is fatal to his award; but when an award is moved against on the ground of such failure, it must be clearly shewn that the applicant was not aware of the omission until after the making of the award. An arbitrator to whom is referred a claim for compensation for injury to land by reason of the lowering of the grade of the adjoining highway by the municipality, has no power to direct the municipality to maintain a retaining wall. The arbitrator has power to include in his award compensation to the landowner for injury to his land during the progress of the work by interference with the means of access thereto, and also the cost of work done to afford him such access. *In re Burnett and Town of Durham*, 20 Occ. N. 13, 31 O. R. 262.

2. Costs — *Discretion.*]—An arbitrator appointed under s. 437 of the Municipal Act, R. S. O. c. 223, is given power by s. 460 "to award the payment by any of the parties to the other of the costs of the arbitration or of any portion thereof:"—*Held*, that the discretion thus given must be a legal discretion, and the arbitrator should be governed by the rule that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part, the Court cannot take away his right to costs. And there being nothing in this case to warrant any departure from the rule that the unsuccessful party should bear the whole costs of the litigation, the award was modified accordingly. *In re Pattullo and Town of Orangeville*, 19 Occ. N. 388. 31 O. R. 192.

3. Lands injuriously affected—*Interest.*]—If in the construction of a public work by a municipality land of a private owner is injuriously affected, and the compensation therefor is determined by arbitration, interest cannot be allowed by the arbitrator on the amount of compensation awarded. Judgment in 19 Occ. N. 263, 26 A. R. 351, affirmed. *In re Leak and City of Toronto*, 20 Occ. N. 221, 30 S. C. R. 321.

See *post.* IX. 1.

III. Bridges.

1. By-law—*Money — Illegality — Maintenance—Reconstruction.*]—When a municipal corporation claims payment of a sum of money which it alleges is due to it by virtue of a by-law, *procès verbal*, or resolution, by a person or corporation, the latter can defeat the demand by pleading specially that the plaintiff corporation cannot claim such payment because the by-law, *procès-verbal*, or resolution is illegal, and the defendant can prove his allegations just as if he made them in an action to set aside the by-law, etc.—2. A by-law passed by a county council, even if so passed with the requisite formalities, is illegal if it imposes upon two municipalities the cost *en bloc* of a bridge which the county corporation has taken under its charge and declared to be a public bridge.—3. A by-law imposing upon two municipalities the cost of the rebuilding of an iron bridge without designating the lands which are to be bound to contribute to such cost, is void.—4. A by-law passed for the maintenance only of a wooden bridge, and involving but a

trifling expense, cannot serve to authorize, without further formalities, the rebuilding in iron of this same bridge, which will cost much more. *County of Megantic* v. *Township of Nelson*, Q. R. 17 S. C. 87.

2. Counties — *Board of delegates — Superintendent — Appointment of — Local work.*] — The council of the county of Hochelaga, having been served with a petition for the repair or reconstruction of a municipal bridge, which was under the charge of the counties of Hochelaga and Jacques Cartier, by virtue of old *procès-verbaux*, ordered the reference of the petition to the board of delegates of the two counties, and this board named a special superintendent to see to the work of repairing or reconstructing the bridge, with power to make all amendments to the *procès-verbaux* relating to the bridge. The superintendent accepted the commission, but afterwards, upon the ground that his powers were not extended enough, offered his resignation, and asked to be appointed anew with more extended powers, and particularly with power to declare that the bridge was a local one, in charge of the authorities at *Sault du Recollet*. The board of delegates accepted the resignation of the special superintendent, decided to leave the bridge a county bridge, under the authority of the board, and appointed anew the same special superintendent, with power to amend or abrogate the *procès-verbaux* in force, after having taken the advice of those interested at a meeting. The special superintendent proceeded anew, called those interested together, but, without consulting them on that point, declared that the bridge was a local one; and his report was homologated by the board of directors:—*Held*, that the board of delegates had no power to appoint a special superintendent.—2 That the proper procedure was to have the special superintendent named by the council of the county of Hochelaga, and he would then have made his report to that council, who would then have submitted it to the board of delegates.—3. That the superintendent, besides, had no power to declare the bridge a local one, the board having decided, when appointing him, to leave it a county bridge. *Parish of Sault du Recollet* v. *County of Hochelaga*, Q. R. 17 S. C. 59.

3. Maintenance—*Local municipalities —Ratepayers and lands benefited.*]—When the board of delegates has declared a local bridge to be a county bridge, the local corporation charged with the maintenance of this bridge must determine by by-law which of its ratepayers shall contribute to the maintenance of such bridge; the effect of the decision of the board of delegates not being to charge the bridge upon all the ratepayers of the local municipality.—Although it may be irregular to impose the work in connection with a bridge upon the owners of parcels of land designated on a plan by different numbers, without indicating the number of the lot which contains the land through which the stream flows, nevertheless such irregularity is not sufficient to make the by-law void, if it is proved that these lands, although they bear different numbers, form only one and the same parcel.—Nevertheless, a municipal bridge being in principle a charge upon all the ratepayers of the range upon which it is situated (Art. 856, C. M.), certain ratepayers of this range cannot by by-law be exempted from the maintenance of this bridge, on the ground that they have already been charged with other bridges built over watercourses which such ratepayers have made to drain their own lands and in their own interests exclusively. *Dupuis* v. *Parish of St. Isidore*, Q. R. 17 S. C. 482.

See RAILWAYS AND RAILWAY COMPANIES, II.

IV. By-laws.

1. Bonus—*Factory—Number of persons employed—Demand.*]—To satisfy a municipal bonus by-law requiring that the respondents should employ at least a hundred persons during the first year and from a hundred and fifty to two hundred during the second and subsequent years, it is sufficient to have employed and paid on an average the number of persons mentioned in the by-law. —The demand upon the appellants by two letters, the first coming from the respondents and the second from their solicitors, was sufficient, the respondents not being obliged to furnish proof that the conditions of the by-law had been fulfilled, seeing that the by-law itself did not require it. *Town of Levis* v. *King*, Q. R. 9 Q. B. 1.

2. Bringing into effect — *Printed roll — Attestation — Injunction — Action —Certiorari.*]—Where a revising by-law purports to bring into effect a number of by-laws contained in a printed roll alleged to be attested by the mayor and city clerk, but such roll was not, in fact, so attested until after the final passage of the revising by-law, such by-law has failed to bring into force any by-law contained in such roll. Sections 91 and 92 of the Municipal Clauses Act do not prevent suit to restrain a municipality from proceeding under a by-law which has not been quashed, but

only prevent an action, for damages already suffered, till the by-law is quashed. The validity of such a by-law may be determined in *certiorari* proceedings. *Traves* v. *City of Nelson — In re Traves*, 7 Brit. Col. L. R. 48.

3. Building regulations—*Conviction —Costs—Conveyance to gaol.*]—Mere disobedience of an order of the building inspector in the city of Montreal, under by-law 107, is not of itself an offence and is not sufficient to justify a conviction, and the mere statement by him, in a notice, that a breach of some building regulation has been committed does not prove its existence. The evidence must establish, and the conviction must set out, both the infraction and the notice to amend.—2. Section 11 of by-law 107 of the city of Montreal does not in express terms assert and require that the foundations of all buildings within the city must be of stone only.—3. When a statute or by-law states that imprisonment ends on payment of fine and costs, a conviction which requires in addition the payment of charges for conveyance to prison is illegal, and will be set aside. *Brunet* v. *City of Montreal*, Q. R. 17 S. C. 81.

4. License — *Cancellation—Delegation of powers.*] — A municipal corporation cannot delegate to a board of health any power to cancel a license which it may have under 62 V. sess. 2, c. 26, s. 37 (2); and a by-law delegating such power was quashed. *Hodge* v. *The Queen*, 9 App. Cas. 117, and *The Queen* v. *Burah*, 3 App. Cas. 889, followed. *In re Foster and City of Hamilton*, 20 Occ. N. 40, 31 O. R. 292.

5. Money — *Borrowing—Necessity for by-law—Resolution.*] — The provisions of Art. 492 *et seq.*, C. M., which forbid municipal corporations to borrow otherwise than under a by-law, do not apply to a temporary borrowing, of a small amount, to provide for immediate needs. Therefore it is legal for a municipal council to pass a resolution authorizing the mayor and the secretary-treasurer to borrow, upon promissory note, in the name of the corporation, a sum of $500, to provide for urgent repairs to sidewalks and roads. *Giroux* v. *Village of Coteau Landing*, Q. R. 17 S. C. 271.

6. Money—*Borrowing—Recital of existing debt—Statutes.*]—The Municipal Act, R. S. O. c. 223, by s. 385 (2), after declaring that debentures issued under local improvement by-laws of a municipality, on the security of special assessments therefor, form no part of the general debt of such municipality, provides that it shall not be necessary to recite the amount of such local improvement debt in any by-law for borrowing money on the credit of the municipality, but that it shall be sufficient to state in any such by-law that the amount of the general debt of the municipality as therein set forth, pursuant to s. 384 (10), is exclusive of local improvement debts secured by special Acts, rates, or assessments:—*Held*, that this concluding clause is directory only, and the omission to observe it will not alone invalidate the by-law. *Ward* v. *Town of Welland*, 20 Occ. N. 9, 31 O. R. 303.

7. New road — *Compulsion — Uncertainty.*] — Upon the request of certain cotton mill companies, a parish municipality adopted a by-law requiring the plaintiffs to open a municipal road to communicate with the rest of the parish. This road was intended to give a means of communication with the public road to the occupants of cottages built for workmen in the mills. In order to open the road ordered by this by-law, the plaintiffs would have been obliged to remove several of their posts, to pull down houses, and to erect works of considerable value. The by-law stated that for its whole course the road should be as far as possible of the length fixed by law for front roads; that the level should be raised wherever necessary by means of earth, stone, etc.; and that the width should be 36 feet, and if that was not possible, of the greatest width possible. The plaintiffs were already maintaining a road in front of their property:—*Held*, that the by-law was vague and uncertain, that it did not fulfil the conditions required by law, and was, besides, oppressive. *Montmorency Electric Power Co.* v. *Corporation of Beaufort*, Q. R. 16 S. C. 305.

8. Regulation of taverns—*Music—Publication.*]—The by-laws passed by the council of the city of Montreal are public laws within the limits of that city, without publication or promulgation.—2. The council of the city of Montreal has the power to pass a by-law prohibiting musical saloons or establishments where intoxicating liquors are sold, and vocal or instrumental music used for the purpose of attracting customers, and imposing a penalty upon persons keeping such establishments, and a conviction under such by-law will not be quashed on a writ of *certiorari*. *In re Ménard and City of Montreal*, 2 Q. P. R. 434.

See III. 1, VIII. 1, 2, XV.

See APPEAL, V. 2—CONSTITUTIONAL LAW, 4—COSTS, VI. 3—CRIMINAL LAW, IX. 4—FIRE, 2—JUSTICE OF THE PEACE, 3—LIQUOR LICENSE ACT, IV. 1—WAY, IV. 3, VII. 2.

V. Common.

Town limits — *Erection of house — Ejectment — Demand — Improvements — Tender.*]—Certain lands were by order in council and Act of Assembly vested in the municipality of Victoria for the use and benefit, as a common, of the inhabitants of the town of Grand Falls. By subsequent legislation they were transferred to and vested in the town of Grand Falls "to the same extent as was given to the said municipality." By another Act a portion of the common without the town limits was transferred to the town. Upon the land within the town limits the defendant entered and commenced to erect a house. The plaintiffs thereupon brought ejectment:—*Held*, (1.) that the action was properly brought in the name of the town of Grand Falls instead of the town council of Grand Falls; (2.) that the action of ejectment would lie; (3.) that the evidence shewed sufficient demand of possession; (4.) that it was not necessary to make a tender for improvements, as 38 V. c. 42 only applied to improvements on the land at the time of its passage; (5.) that 59 V. c. 69 does not abridge or take away any of the rights to the common within the town. *Town of Grand Falls* v. *Petit*, 34 N. B. Reps. 355.

VI. Contracts.

1. Action to set aside—*Resolution—Security — Amendment — Summary procedure.*]—If the security given in an action to set aside a resolution of a municipal council and a contract awarded thereunder is insufficient, the sole surety not having justified in respect of real estate, the plaintiff will be allowed, on payment of costs, to set it right.—2. An amendment to a petition will be allowed on motion, upon verifying the amendment by affidavit on payment of costs.—3. An action to set aside a resolution and a contract cannot be brought summarily, and the Court, upon *exception à la forme*, will order to be struck out everything relating to the setting aside of the contract. *Bédard* v. *City of St. Henri*, 3 Q. P. R. 212.

2. Building contract—*Municipal hall—Reference—Law and fact—Non-proof of by-law — Waiver—Amendment—Plans and specifications.*]—On a reference of an action, it is inadvisable, unless the line between the questions of law and fact is clear and distinct, to divide up the reference by first directing the evidence to the question of legal liability, leaving the quantum of damages and all other matters to be afterwards disposed of. An objection as to the non-proof of a by-law authorizing a contract by a municipality for the erection of a town and fire hall, raised for the first time at the close of a reference, in an action to recover a balance due under the contract, was overruled, where the contract was declared on and referred to in the statement of defence, and identified by the mayor on the application for the reference by the defendants, and made part of the defendants' material, and treated as the contract throughout the whole reference, and upon which large sums of money had been paid under by-laws passed therefor. An application for leave to amend so as to set up such objection was also refused. Plans and specifications—the latter being divided under the headings "notes," "conditions," and "specifications," all bound up together and forming one document—drawn up for the erection of the said buildings, and (on the execution of the contract) an indorsement, initialled by the contractor and mayor, made on the specifications, stating that they were those referred to in the contract, must be read together as constituting one entire contract. *Ryan* v. *Town of Carleton Place*, 20 Occ. N. 230, 31 O. R. 639.

See Street Railways, I.

VII. Councillors.

1. Declaration of vacancy—*Resolution of council — Grounds—Mandamus.*]—Art. 208 of the Municipal Code, which provides that if the disqualification of a person holding a municipal office is *notorious or sufficiently established*, the council may by resolution declare the office of such person vacant, does not justify the proceeding of a municipal council in declaring the seat of a councillor vacant when the person unseated has made sworn declaration of his property qualification, and when the grounds of disqualification alleged are doubtful, and depend upon the interpretation to be given to articles of the municipal code. And a writ of *mandamus* lies, in such case, to order the council to restore the ejected member to his privileges as councillor. *Pelletier* v. *Village of Lorimer*, Q. R. 17 S. C. 509.

2. Duration of office—*Tirage au sort—Remedy—Mandamus — Quo warranto.*]—Where municipal councillors are named by the Lieutenant-Governor, without determining the duration of their term of office, the council should, at one of its sittings, draw lots to decide which one of them should retire from office.—Art. 280, C. M., which authorizes the drawing of lots, is applicable in this case.—The legal remedy for a councillor so named, who has been deprived of his office, is

mandamus and not *quo warranto*. *Gosselin* v. *Corporation of St. Jean*, Q. R. 16 S. C. 449.

3. Election—*Powers of old council.*]—A resolution passed by a municipal council composed of six members, two of whom have just been replaced by the election of new councillors, is void. *Laroche* v. *Corporation de Ste. Emilie de Lotbinière*, Q. R. 17 S. C. 352.

4. Ouster — *Resolution of council—Pleading.*]—In an action by a municipal councillor asking that he be replaced in possession of his office, of which he was deprived by a resolution of the council, there is no incompatibility in claiming that the resolution shall be set aside as well as that the council shall be ordered to replace him in the office. *Bédard* v. *Village of Delorimier*, Q. R. 17 S. C. 141.

See CONTRACT, I. 2 — MUNICIPAL ELECTIONS, II.

VIII. DRAINAGE.

1. By-law—*Petitions for—Qualification—Damages.*] — The assessment roll last revised previous to the passing of a drainage by-law is the one to be looked at for the purpose of ascertaining whether the petition for the work was sufficiently signed to authorize the passing of the by-law. The words "exclusive of farmers' sons not actual owners," is s.-s. 1 of s. 3, R. S. O. c. 226, do not refer to farmers' sons who are not actual owners in fact, but to farmers' sons so shewn by the last revised assessment roll. A farmer and his sons arranged that he should convey his farm to them, taking back a life lease :—*Held*, that this was sufficient to give them an interest in the land, of a freehold nature, entitling them to be assessed as joint owners, and so assessed they are not "farmers' sons not actual owners."—*Held*, also, following *Connor* v. *Middagh*, 16 A. R. 356, and *McCulloch* v. *Township of Caledonia*, 25 A R. 417, that, the by-law not having been quashed, the plaintiff was not entitled to damages for work done under it, although it was invalid. *Challoner* v. *Township of Lobo*, 32 O. R. 247.

2. Debentures—*Maintenance—Embanking work — Registration of by-laws.*] — Section 83 of the Drainage Act, R. S. O. c. 226, directing that the time for payment of debentures issued for the cost of maintenance of a drainage work shall not exceed seven years, does not apply to debentures issued for the cost of extending, improving, or altering a drainage work, and the municipality has the same power to issue debentures as in the case of an original drainage work. Because in the course of the construction of a railway work banks are formed with the spoil cast from the dredge, the work is not one within s.-s. 2 of s. 3 of the Drainage Act, R. S. O. c. 226; that sub-section relates to the reclamation of wet or submerged lands. *Semble*, that the provisions of the Municipal Act as to the registration of by-laws for contracting debts apply to by-laws for the issue of debentures for drainage works, and when such by-laws have been registered in accordance with the provisions of the Act, they cannot be set aside, even if originally *ultra vires*. Judgment of Ferguson, J., 18 Occ. N. 342, affirmed. *Sutherland-Innes Co* v. *Township of Romney*, 19 Occ. N. 381. 26 A. R. 495

3. Injuring liability—*Natural watercourse.*]—Under s.-s. 3 of s. 3 of R. S. O. c. 226, lands in one municipality from which water has been caused to flow upon and injure lands in another municipality, either immediately, or by means of another drain, or by means of a natural watercourse, may be assessed and charged for the construction and maintenance of a drainage work required to relieve the injured lands from such water. *In re Townships of Orford and Howard*, 18 A. R. 496, *In re Townships of Harwich and Raleigh*, 21 A. R. 677, and *Broughton* v. *Township of Grey*. 27 S. C. R. 495, distinguished. *In re Township of Orford and Township of Howard*, 20 Occ. N. 206, 27 A. R. 223.

4. Mandamus — *Notice — Damages—Drain insufficient to carry off water.*]—To entitle a person who or whose property is injuriously affected by the condition of a drain to a mandamus for the performance of such work as may be necessary to put the drain in proper condition, the notice required by s. 73 of the Drainage Act, R. S. O. c. 226, while not necessarily in technical form, must be so clear and precise that the municipality can decide whether the complaint is well founded or frivolous, and must be one which the municipality would be justified in acting upon under s.-s. (*a*) of that section. A letter referring to defects in the drain, and suggesting steps to be taken, but not calling upon the municipality to do specific work, is not sufficient. The notice by which proceedings are initiated in Court cannot be regarded as a notice under s. 73. A person who or whose property is injuriously affected by the condition of a drain is entitled to recover from the municipality charged with the duty of maintaining it such damages as he sustains by reason of its non-repair, whether caused by the flooding of his land by the waters of the drain, or by its failure

to carry off the water which came upon the land in the course of nature. *Crawford* v. *Township of Ellice*, 19 Occ. N. 385, 26 A. R. 484.

5. Report of engineer—*Amendment—Failure to take oath—Appeal.*]—Taking the oath prescribed in s. 5 of the Municipal Drainage Act, R. S. O. c. 226, is an essential prerequisite to the exercise or jurisdiction by the engineer under s. 75 of that Act. While an appeal to the Drainage Referee against a report is pending, the initiating municipality cannot refer back the report to the engineer for amendment. *In re Township of Colchester North and Township of Gosfield North*, 20 Occ. N. 207, 27 A. R. 281.

6. Report of engineer—*Amendment—Jurisdiction of Referee—Appeal — Court of Appeal.*]—The Drainage Referee cannot, under s. 89 of the Drainage Act, R. S. O. c. 226, upon the admission of the initiating township that the report appealed from is defective, refer it back, against the wishes of the appealing townships, to the engineer for amendment. That course can be adopted, if at all, only with the engineer's consent and upon evidence given. An order assuming to refer back a report is not an interlocutory order within the meaning of s. 90 of the Drainage Act, R. S. O. c. 226, and an appeal lies to the Court of Appeal against it. *Townships of Adelaide and Warwick* v. *Township of Metcalfe*, 20 Occ. N. 63, 27 A. R. 92.

7. Servitude — *Procès-verbal—Description of property — Nullity — Payment for benefit.*] — The absence of the proper designation and description of property affected by servitude created by *procès-verbal* regulating cost of construction and maintenance of an artificial watercourse is a radical nullity, and not an informality.—2. Such nullity may be legally pleaded in answer to a suit for recovery of cost of proportion of work created by such *procès-verbal*, which by-law is still in existence.—3. Promise to pay made by defendant is null for want of legal consideration. *Township of St. Edwidge de Clifton* v. *Foy*, Q. R. 16 S. C. 418

See ASSESSMENT AND TAXES, IV. 2—COSTS, III. 5, 6, 7—LOCAL JUDGES AND MASTERS, 1 — WATER AND WATERCOURSES, I. 2.

IX. EXPROPRIATION.

1. Compensation—*Interest.*]—A person whose land has been expropriated by the city of Montreal, and to whom the Court has allowed a larger amount of compensation than that which the award gave him, is entitled to recover interest upon the sum constituting the difference between the two amounts, from the day of the publication of the award to that of the judgment of the Court. *Grand Trunk R. W. Co.* v. *City of Montreal*, 3 Q. P. R. 322.

See *ante*, II. 1.

2. Mistake — *Notice—Claim for compensation—Costs—Damages.*] — The plaintiff was the owner of land which would, according to the homologated plan of the city of Montreal, be crossed by a projected street. The defendants, intending to proceed with their annual expropriations, gave public notice, in the ordinary form, designating the lots which were to be expropriated, among which was that of the plaintiff. This lot was not in a position to be expropriated, and it was by mistake that it was included, which the plaintiff must have known. Nevertheless, he appeared before the expropriation commissioners and made a claim, which was rejected by the commissioners on the ground that the annual expropriation related only to the widening of streets already opened, and not to the opening of new streets, and this decision was homologated by the Court. Afterwards the defendants were authorized by the Legislature to suspend the projected expropriations:—*Held*, that, under these circumstances, the plaintiff could not recover the costs which he had incurred in submitting his claim to the commissioners, nor could he compel the defendants to proceed with the expropriation; but the Court reserved to the plaintiff his right to proceed for damages, etc. *Gallagher* v. *City of Montreal*, Q. R. 17 S. C. 242.

See APPEAL, IX. 4—WAY, II. 2.

X. LOCAL IMPROVEMENTS.

1. Frontage system—*Mode of assessment—Court of Revision — County Court Judge—Prohibition.*] — When a sewer is being constructed by a municipal corporation under the local improvement system, and land not fronting on the street in question is benefited, as well as land fronting thereon, the proper method of assessment is to determine what proportion of the cost the land fronting on the street shall bear, and what proportion the land not so fronting shall bear, and to assess the proportion payable by each class according to the total frontage of that class, and not according to the benefit received by the lots in that class *inter se*. Judgment of a Divisional Court, 30 O. R. 158, *ante* 31, affirmed: Burton, C. J. O., dissenting. But, *held*, also, reversing that judgment, Osler and Moss, JJ. A., dissenting, that after the

County Court Judge had, on appeal by an owner, taken a contrary view and altered the assessment, it was too late to obtain an order for prohibition. *In re Robertson and City of Chatham*, 19 Occ. N. 380, 26 A. R. 554.

2. Pavement—*Liability to repair.*]—A city corporation having, by by-law, adopted the local improvement system, a pavement was constructed as a local improvement in 1891, composed of cedar blocks. The by-law for levying the assessments stated that ten years was the "lifetime" of the pavement:—*Held*, that what the legislature contemplated by ss. 664-666 of the Municipal Act, R. S. O. c. 223, was that the initial cost of the construction of the local work or improvement should be borne by the owners of the property benefited by it, but that they should not be responsible for the keeping of it in repair, that duty being cast upon the municipality generally, and that when it should become necessary to reconstruct the work or improvement, the cost of doing so should be defrayed by the owners of the property benefited by the work of reconstruction. This duty to repair is not to be confounded with the general duty to repair, which is one towards the public. This duty ends when it becomes necessary to reconstruct the work or improvement, and whenever it is worn out and not worth repairing, no order for repair can be made under the amendment to s. 666 contained in s. 41 of 62 V., sess. 2, c. 26. *In re Medland and City of Toronto*, 20 Occ. N. 12, 31 O. R. 243.

XI. Markets.

1. Auctioneer.] — Neither under s. 580, nor under s. 583 (2), of the Municipal Act, R. S. O. c. 223, can a municipal corporation prohibit an auctioneer from carrying on his business in the public markets of the city in respect of any commodities which may properly be sold there. Judgment of a Divisional Court, 30 O. R. 7, 18 Occ. N. 401, affirmed. *Bollander* v. *City of Ottawa*, 20 Occ. N. 296, 27 A. R. 335.

2. Confiscation of meat—*Damages—Powers of inspector.*]—The plaintiff, a farmer, offered meat for sale in a market, which was confiscated by an inspector of meat. The plaintiff brought this action against the municipality which employed the inspector, to recover the value of the meat and damages:—*Held*, that the authority of the inspector was incontestable, and, even if he were wrong in his judgment, the vendor could not resist him there and then; but the power of the inspector was administrative not judicial; and, as it appeared upon the evidence in this case that the meat seized was good, the plaintiff was entitled to damages. *Blouin* v. *City of Quebec*, Q. R. 16 S. C. 303.

3. Negligence—*Injury to cattle.*]—A city corporation, having lawfully established a public cattle market under the Municipal Act, and fixed the fees to be paid by persons using it, are not liable to a person who has paid the usual market fee for the safe-keeping of animals placed by him in a pen in such market. *Semble*, also, that no negligence on the part of the caretaker of the market was shewn, the injury to the cattle having been apparently wilfully done by some unknown person. *Gillies* v. *Hodgson*, 20 Occ. N. 336.

See Injunction, I.

XII. Public Buildings.

Registry office — *Powers of county council—Acquiescence.*]—A county corporation, although bound by law to provide, and keep constantly in perfect repair, a suitable and ample metal safe or fireproof vault in the registry office of the county, has no authority to bind the city or town municipalities within the county for the cost of a building, part of which is to be used as a registry office and part as a hall for the meetings of the county council, and also for the sittings of the district magistrate's Court. If it be desired to erect a building for such purposes, the cost of the different parts should be established by the tenders received for the construction, or by other sufficient evidence,—in which case the municipalities would be liable for the cost of the part absolutely required for the registry office and fire-proof vault or safe. 2. The fact that individual members of a city corporation within the county were aware of the construction of a building for the joint purpose of a registry office and hall for meetings, and did not object thereto, does not bind the corporation,—a municipal corporation being only bound by the corporate action of its council. *County of Richelieu* v. *City of Sorel*, Q. R. 8 Q. B. 526.

See Parties, III. 4.

XIII. Resolutions.

1. Quashing—*Procedure—Costs.*]—The quashing of resolutions of a municipal council may be ordered as well in an action as upon a petition, except as to the question of costs, which is left to

the discretion of the Court. *Patry* v. *Corporation of Levis*, Q. R. 16 S. C. 310.

2. Quashing — *Procedure — Time.*]— Where a resolution passed by a municipal council is attacked under the provisions of the Municipal Code, the rules of the Code must be followed, and the proceedings be begun within 30 days; but if the procedure of the common law is adopted before the Superior Court, the plaintiff is not tied down to the rules or the prescription of the Municipal Code. *Roy* v. *Corporation of St. Gervais*, Q. R. 17 S. C. 377.

See IV. 5, VI. 1, VII. 1, 3.

See APPEAL, X. 3—ASSESSMENT AND TAXES, VII. 2—INJUNCTION, I. 5.

XIV. SERVICES.

Construction—*Depth—Abutting lands.*] —A municipal corporation when it constructs a system of sewers in a public highway is not bound to place them lower than at the depth required for the general convenience of the lands abutting on the highway; and when any of such lands are in an exceptional position so that at certain points their level is lower than that of the sewer, it is for the owners of these lands to put their property in a position to benefit by the sewer, the corporation not being bound to provide for exceptional cases. *Roberts* v. *City of Montreal*, Q. R. 16 S. C. 342.

See VENDOR AND PURCHASER, 1.

XV. TRANSIENT TRADERS.

1. By-law—*Conviction—Penalty—Costs —Imprisonment—Distress.*]—*Held*, that the defendant, convicted under a municipal by-law for carrying on business without a transient trader's license, was not brought within either the first or second clause of the by-law, as it was not alleged or charged that she was a transient trader or that she occupied premises in the municipality for a temporary period; and these omissions were fatal to the conviction. *Regina* v. *Caton*, 16 O. R. 11, followed. *Held*, also, that the conviction was open to objection because of the application of the penalty upon taxes to become due, the award of the costs to the justice, instead of to the informant, and the award of imprisonment upon default in payment of the penalty. The conviction was quashed, and costs were given against the informant. *Regina* v. *Roche*, 20 Occ. N. 307, 32 O. R. 20.

2. By-law — *Regulation of hawkers — Proviso—Negativing exception—Conviction—Quashing—Costs.*]—A by-law of a county council recited the provisions of s.-s. 14 of s. 583 of the Municipal Act, R. S. O. c. 223, and that it was expedient to enact a by-law for the purpose mentioned in the sub-section; it then went on to enact "that no person shall exercise the calling of a hawker, pedlar, or petty chapman in the county without a license obtained as in this by-law provided;" but the by-law contained no such exception as is mentioned in the proviso to s.-s. 14, in favour of the manufacturer or producer and his servants:—*Held*, that the by-law was *ultra vires* the council, and a conviction under it was bad:—*Held*, also, following *Regina* v. *McFarlane*, 17 Occ. N. 29, that the conviction was bad because it did not negative the exception contained in the proviso, and there was no power to amend it, because the evidence did not shew whether or not defendant's acts came within it. The conviction was therefore quashed, but costs were not given against the informant. *Regina* v. *Smith*, 20 Occ. N. 6, 31 O. R. 224.

3. By-law—*Sale — Trading stamps.*]— The defendant entered into an arrangement with various retail merchants by which each of them was to receive from him a quantity of "trading stamps," the property in which, however, was to remain in him, and to pay him fifty cents for every hundred of such stamps received, and to give one of these stamps to each customer who purchased for cash ten cents worth of goods, while he on his part was to adverstise them in certain directories to be distributed by him, and also in newspapers. A blank space was left in these directories for pasting in such stamps, and every customer of any of the merchants who brought to the defendant one of the directories with 990 stamps pasted in it, was entitled to receive in exchange any one he might select of an assortment of goods kept in stock by the defendant. Apart from this, these goods were not for sale:—*Held*, that these transactions did not constitute a "selling or offering for sale" by the defendant within the meaning of a municipal by-law passed under R. S. O. c. 223, s. 583, s.-ss. 30, 31, the stamps delivered to the defendant in exchange for his goods being of no value to him. The essence of sale is transfer of property from one person to another for money or money's worth. *Regina* v. *Langley*, 20 Occ. N. 2, 31 O. R. 295.

4. License—*Occupant of premises—Conviction.*]—Where goods are consigned by the owner to be sold on commission, and they are sold by the consignee by auction in premises rented by him, the

owner is not an occupant of such premises nor a transient trader within the Municipal Clauses Act, R. S. B. C. 1897 c. 144, s. 171, s.-s. 23, as amended in 1898 by c. 35, s. 19. To support a conviction it is essential that the person charged occupy premises in the municipality. *Regina* v. *Wilson*, 20 Occ. N. 144, 7 Brit. Col. L. R. 112.

XVI. WATERWORKS.

1. Arbitration—*Payment into Court—Interest.*]—Where a municipal corporation, taking over the works of a waterworks company under the statutory arbitration procedure, wishes to take advantage of the provisions of ss. 445 and 446 of the Municipal Act, it must pay into Court the amount awarded, with interest to the date of payment in and six months' interest in advance. Judgment in 30 O. R. 81, 19 Occ. N. 36, affirmed. *In re Town of Cornwall and Cornwall Waterworks Co.*, 20 Occ. N. 61, 27 A. R .48.

2. Construction on private property—*Destruction.*]—The appellants had constructed a pipe or conduit by means of which they obtained water from a small stream. The respondent insisted that they were not entitled to do so, and they destroyed the part of the pipe which came out at the stream, but left standing other works upon their own land. Hence action was taken by the respondent to force the appellants to destroy even that part of their works made upon their own lands:—*Held*, that the works on the property of the appellant were the cause of no wrong to the respondent and were not a serious menace of trouble justifying his demand for demolition.—2. To order the destruction of these works constructed altogether upon the lands of the appellants and which they declared were necessary for lawful purposes and public use, would be an unjustifiable invasion of the right of property. *Corporation of Limoilu* v. *Paradis*, Q. R. 9 Q. B. 18.

3. Improper construction—*Notice—Waiver—Condition precedent.*]—A contract for the construction and maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corporation, and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works, the corporation served a protest upon the contractors, complaining in general terms of the insufficiency and unsatisfactory construction of the works, without specifying particular defects, but made use of the works complained of for about nine years, when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under conditions in the contract:—*Held*, that, after the long delay, when the contractors could not be replaced in their original position, the complaint must be deemed to have been waived by acceptance and use of the waterworks, and it would, under the circumstances, be inequitable to rescind the contract:—*Held*, further, that a notice specifying the particular defects to be remedied was a condition precedent to action, and that the protest in general terms was not a sufficient compliance therewith to place the contractors in default. *Town of Richmond* v. *Lafontaine*, 20 Occ. N. 51, 30 S. C. R. 155.

4. Water company—*Ratepayer.*]—A municipal corporation which, under the provisions of the Municipal Code, grants to a company the privilege, during a term of years, of furnishing water to the ratepayers, who are to pay for the water according to the tariff established as soon as the company shall offer to furnish it to them, is not liable by reason of the fact that the company will not furnish to one of the ratepayers the quantity of water which he requires. *Wilshire* v. *Village of Mile-End*, Q. R. 8 Q. B., 479.

See DISTRESS.

MUNICIPAL ELECTIONS.

I. CONTESTED ELECTIONS—PROCEDURE.
II. QUALIFICATION OR DISQUALIFICATION OF PERSONS ELECTED.

See MUNICIPAL CORPORATIONS, VII.

I. CONTESTED ELECTIONS—PROCEDURE.

1. Abandonment of proceedings—*Intervention of electors.*]—There is nothing in the charter of the city of Montreal prohibiting qualified electors of a ward from intervening in a contestation of the election of one of the aldermen of that ward, when they allege that the plaintiff has manifested the intention of abandoning the proceedings.—Although the intervenants may be, by reason of the delay elapsed since the election, precluded from instituting direct proceedings to contest the said election, the lapse of the delay does not deprive them of the right to intervene upon proceedings instituted within the delays, for the purpose of continuing the same, in the event of the plaintiff failing to do so.—Such intervention cannot place the

intervenants in a better position than that of the plaintiff, and they can only ask to be allowed to continue the plaintiff's contestation in the event of his failing to do so, but they cannot ask that the suit be continued as if they had been the original plaintiffs, nor take conclusions which the plaintiff himself has not taken. *Moreau* v. *Lamarche*, 3 Q. P. R. 301.

2. Appeal—*Amending statute—Pending cause.*]—The amendment made to Art. 283 of the charter of the city of Montreal for the purpose of allowing an appeal to the Court of Review from judgments of the Superior Court in contested municipal election cases is not applicable to a cause pending at the time of the assent to the amending statute, which cause is governed, as to the right of appeal, by the statute in force when it is begun. *Renault* v. *Gagnon*, 3 Q. P. R. 209.

3. Appeal—*Statute limiting right—Interlocutory order.*] — The prohibition by the charter of the city of Montreal of an appeal to the Court of Queen's Bench in the matter of contested municipal elections applies to interlocutory as well as final judgments.—Such prohibition is legal and *intra vires*. *Jacques* v. *Clarke*, 3 Q. P. R. 64.

4. Details — *Particulars—Declaration.*] —If a defendant, without contending that the setting forth of the causes of action contained in the declaration is insufficient, asks the Court to order the plaintiff to furnish him with certain details which are necessary to him for the purpose of making his defence, this demand is not an *exception à la forme* and is not subject to the same formalities.—2. The Court can always, in the course of an action, order one of the parties to furnish to another details which the latter requires.—3. This demand of details, granted to facilitate the administration of justice, is different from that upon which the party demanding asks that the allegations of the pleading shall be struck out if particulars are not given in the time fixed by the Court; this latter demand should be treated as an *exception à la forme*.—4. If a judgment dismissing an *exception à la forme* reserves to the defendant the right to demand details, the Court seized of this last demand cannot dismiss it because it does not comply with the formalities required for *exceptions à la forme*.—5. In contested municipal election cases it has been the practice to order particulars without considering the demands therefor as *exceptions à la forme*.—6. In a contested municipal election case the petitioner will be ordered to give the names, christian names, and residences of the agents of the defendant, the fraudulent acts and corrupt practices, bribery and fraud, committed by the defendant and his agents, with his approbation and to his knowledge, the dates and places, as far as possible, where and when they were committed, and how the defendant and his agents, and other persons, have hindered the petitioner from being nominated. *Clarke* v. *Jacques*, 3 Q. P. R. 76.

5. Details—*Status of petitioner.*]—In a petition to void an election the absence of details warrants a motion for details, but not an exception *à la forme*.—2. An objection that the petitioner is not an elector goes to the merits and not to the form. *Moreau* v. *Lamarche*, 3 Q. P. R. 121.

6. Forum — *Petitioner—Qualification—Pleading—Writ of summons—Quo warranto—Security—Notice.*]—A petition to contest a municipal election addressed to the Superior Court may be received by a Judge of the Superior Court.—2. The petitioner sufficiently alleges his qualification to contest an election when he alleges that he is an elector duly qualified to vote at the municipal elections at which the defendant was elected, and that his name was duly entered on the list of electors of the district for which the defendant was elected.—3. An action to void the election will not be dismissed upon *exception à la forme* because the plaintiff has made illegal allegations besides those he had a right to make.—4. The words "*quo warranto*" added to an ordinary writ of summons do not change its nature and do not make it irregular.—5. *Semble*, that it is necessary in an *exception à la forme* in which the sufficiency of the security and of the notice thereof is attacked in contesting an election, to set out in what respects the security and the notice are insufficient. *Archambault* v. *Tansey*, 3 Q. P. R. 50.

7. Pleading—*Previous recount—Illegal votes—Effect on result.*]—In a protested municipal election in which there has already been a recount before the Judge, it is not sufficient to allege that votes have been illegally admitted or rejected, but the number of such votes must be given and the irregularities complained of must be indicated, in order that the Judge may examine the nature of such irregularities and ascertain whether they have had the effect of changing the result of the election. It is necessary to allege that the admission or rejection of votes, as well as votes given by incompetent persons, were for or against the interest of the plaintiff and had the effect of changing the result of the election; otherwise the action will

be dismissed upon demurrer. *Renaud* v. *Gagnon*, 3 Q. P. R. 115.

8. Pleading—*Previous recount—Review of—Allegations of petition—Particulars.*]—In a petition to void a municipal election, under the charter of the city of Montreal, 62 V. c. 58 (Q.), it is not sufficient, for the purpose of obtaining a review of the decisions of a Judge upon a recount, to allege generally that ballots cast in favour of a candidate have been improperly rejected by the deputy returning officers and by the Judge, while irregular ballots cast in favour of the candidate declared elected have been admitted, and that the effect has been to change the result of the election; the petition must point out the irregularities complained of and give the number of ballots irregularly admitted.—Upon such a recount the Judge cannot enter into the merits so as to reject ballots for fraud or want of qualification of voters; his functions are limited to making the count which the deputy returning officers should have made at the close of the poll; but when the election is contested by subsequent action, his decisions may be reviewed.—In such a case the petitioner, where he asks that the votes of certain unqualified persons should be struck off, must make it appear that the admission of such votes has affected the result of the election, and therefore allege that these votes have been given for the candidate declared elected. *Renault* v. *Gagnon*, Q. R. 17 S. C. 315.

9. Security for costs—*Intervention—Irregularity—Sufficiency.*]—In an action to void the election of an alderman for the city of Montreal, under Art. 279 *et seq.* of the charter of the city of Montreal, 62 V. c. 58 (Q.), security furnished by an intervenant more than three days after the filing of his intervention, and upon an irregular notice, will, nevertheless, not be declared void, if it appears that the defendant whose election is protested will not suffer any prejudice from the irregularity of the security, and if the defendant complains only of the irregularity, and not of the sufficiency, of the security; but an opportunity will be given to the defendant to examine the sureties as to their solvency. *Moreau* v. *Lamarche*, 3 Q. P. R. 149.

10. Security for costs — *Surety—Bailiff.*]—A petition in contestation of a municipal election will be dismissed on exception to the form, where one of the sureties given is a bailiff of the Superior Court. *Charbonneau* v. *Ouimet*, 3 Q. P. R. 206.

11. Time—*Statutes — Quo warranto—Service—Petition—Corrupt practices — Particulars.*]—When a special statute does not fix the time for taking proceedings under it, the times prescribed by the Code of Civil Procedure most applicable to the matter in litigation should be applied.—2. The charter of the city of Montreal does not require the petition and the writ of *quo warranto* to be served on the alderman whose election is contested during the thirty days which follow the polling or election by acclamation.—3. The presentation of the petition for a writ of *quo warranto* is made *ex parte*, the Judge himself fixing, if he finds the affidavit satisfactory, the time in which the defendant is o appear; and afterwards the petitioner must serve copies of the writ, petition, and order of the Judge in the periods of time appropriate to the nature of the litigation and sufficient to allow the defendant to defend himself with certainty and with a full knowledge of the cause.—4. An interval of six days between the service of the copy of the writ and the other papers and the return of the writ is sufficient.—5. The order of the Judge allowing the issue of the writ of *quo warranto* and other papers is not exhausted by the service of a copy of these papers upon the wife of the defendant in the street, his house being shut up; the order does not become exhausted until the return-day, by the return itself or by default of return.—6. The Judge who receives a petition verified by oath exercises purely ministerial functions, and the Court cannot consider whether the reception was justified.—7. The omission to mention the names and residences of persons accused of having committed corrupt practices in an election and to particularize the nature of these practices and the dates, places, and circumstances in which they were committed, is a ground for a motion for particulars, but not for an *exception à la forme* asking for the dismissal of the action.—8. That such particulars can be demanded after the time fixed for filing an exception. *Clark* v. *Jacques*, 3 Q. P. R. 12, Q. R. 17 S. C. 322.

12. Writ of Summons — *Affidavit for—Order of Judge—Review—Affidavit of service—Mistake.*]—A Judge in Chambers having been satisfied with an affidavit brought before him upon which he allowed the issue of a writ to inquire into a contested municipal election, the Court will not review his order, even though the affidavit does not conform to the requirements of the law.—The statement of the bailiff in his report as to service that he has served the "declaration" instead of the "petition," is not a fatal irregularity. *Renault* v. *Gagnon*, 2 Q. P. R. 517.

See APPEAL, IX. 5.

II. QUALIFICATION OR DISQUALIFICATION OF PERSONS ELECTED.

1. Alderman—*Property qualification — Motion—Parties.*]—In *quo warranto* proceedings under the Municipal Act, it is permissible to join two or more persons in the one motion only when the grounds of objection apply equally to both.—Where, therefore, the objection was to the qualification of two aldermen, which was separate and distinct, the joining of the two in one motion was held to be improper.—Property which has been in the undisputed possession of an elected candidate for fourteen years, he paying no rent nor giving any acknowledgment of title thereto, his title being admitted by the previous owner, who a few days after the election executed a conveyance thereof to him, was held to constitute a sufficient qualification. — The qualification which by s. 75 of the Municipal Act is allowed to be "partly freehold and partly leasehold," is satisfied by half the amount being freehold and half leasehold. *Regina ex rel. Burnham* v. *Hagerman and Beamish*, 20 Occ. N. 104, 31 O. R. 636.

2. Councillor — *Alien—Naturalization pendente lite.*] — A municipal councillor who was an alien at the time of his election as such and at the time of the issue of a writ of *quo warranto* to deprive him of the office on the ground that he was not a British subject, cannot, by becoming naturalized *pendente lite*, obtain the discharge of the writ, naturalization not having a retroactive effect. *Campeau* v. *Grosbouillot*, Q. R. 17 S. C. 116.

3. Councillor—*Overdue taxes—Residence — Misconduct.*]—A paragraph in the petition accompanying a writ of *quo warranto* to void a municipal election, alleging that the defendant owes taxes to the municipality of which he is one of the councillors will be struck out on demurrer if it does not also allege that the defendant owed these taxes at the time of his election. — 2. That *preuve avant faire droit* will be ordered as regards allegations that the defendant has not his residence nor his place of business within the limits of the municipality; that he has caused to be cancelled a sale of municipal debentures, for the purpose of ratifying, for his personal interest, a subsequent sale thereof more advantageous to him; and that he has caused to be paid to a creditor of the municipality a larger sum than is due with the object of obtaining a commission thereout. *Yale* v. *Bayard*, 2 Q. P. R. 524.

4. Mayor of village—*Property qualification.*]—By s. 51 of the Municipal Act, R. S. M. c. 100, the persons eligible for election as mayors or councillors of villages must be the owners respectively, at the time of the election, of freehold or leasehold, or partly freehold and partly leasehold, real estate, rated in their own names respectively on the last revised assessment roll of the village to at least $500, over and above incumbrances.—The respondent lived with his wife in a village upon a property assessed in the name of the wife as owner at $600. His name appeared on the roll as occupant or tenant of the same property, and opposite his name, under the heading "description and valuation," were dots. His name did not otherwise appear on the roll. The title was in the wife, and the property was incumbered to the extent of $550:—*Held*, that the respondent had not the necessary qualification for mayor of the village. *In re Morden Municipal Election—Ruddell* v. *Garrett*, 19 Occ. N. 254, 12 Man. L. R. 563.

MURDER.

See INSURANCE, VI. 1.

NECESSARIES.

See HUSBAND AND WIFE, II. 2.

NEGLIGENCE.

1. Collision of vehicles—*Bicycle—Rule of the road.*]—The plaintiff, while riding a bicycle on St. Lawrence street in the city of Montreal, was injured by the defendants' horse and waggon, which were being driven in the opposite direction, and on the wrong side of the road, but it was shewn that there was ample room for the plaintiff to pass with his bicycle between the conveyance and the sidewalk:—*Held*, that, although the accident might not have happened had the defendants been driving on the right side of the street, the plaintiff could not recover, he having lost his balance while approaching or passing the defendants' waggon, and this being the immediate cause of the injuries sustained. *Brownstein* v. *Imperial Electric Light Co.*, Q. R. 17 S. C. 202.

2. Evidence — *Presumption—Onus probandi — Insurance—Subrogation.*]—Where damage is caused to a plate glass window, the *onus probandi* is on the party causing the damage to prove that he was not in fault, the presumption being that the window was broken by his negligence. — 2. Where the insurance company replaces the broken window and is subrogated in the rights of the

insured, the company is entitled to claim from the party causing the damage, although the insurance company insures against accident.—3. It is negligence on the part of the roofer not to protect plate glass windows by some means when clearing the roof above from snow. *Lloyds Plate Glass Co.* v. *Powell*, Q. R. 16 S. C. 432.

3. Infant—*Dangerous article near highway.*]—The plaintiff, a boy of twelve, entered upon railway property and took a fog signal out of a box on a handcar standing there, which he struck with a stone and exploded, injuring himself: —*Held*, that, as the boy was a trespasser, the defendants were not liable. *Barnes* v. *Ward*, 9 C. B. 392, distinguished. *Smith* v. *Hayes*, 29 O. R. 283, 18 Occ. N. 134, followed. *McShane* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 19 Occ. N. 387, 31 O. R. 185.

See CROWN, II. — DAMAGES, 2—EVIDENCE, I. 1, 2—EXECUTORS AND ADMINISTRATORS, 6 — FERRY, 2 — FIRE, 2 — LIMITATION OF ACTIONS, 10—MASTER AND SERVANT, IV., VII.—MINES AND MINERALS, II. 4—MUNICIPAL CORPORATIONS, VI. 3 — PARTICULARS, II. 11 — RAILWAYS AND RAILWAY COMPANIES, VI., X.—SHIP—STREET RAILWAYS, II. — WATER AND WATERCOURSES, I. 2 — WAY, V., VI., VII.

NEW TRIAL.

1. Verdict—*Finding of jury.*]—Where a case has been properly submitted to the jury, and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial Judge was dissatisfied with the verdict. *Fraser* v. *Drew*, 20 Occ. N. 111, 30 S. C. R. 241.

2. Verdict of jury—*Judgment.*]—In an action for negligence against a municipality the Judge gave judgment for the defendants, holding that the findings of the jury in favour of the plaintiff amounted to a verdict of non-feasance only. Other actions by other plaintiffs arising out of the same occurrence had been decided against the defendants by the Privy Council:—*Held*, that it was useless to send the case to another jury, and that the plaintiff was entitled to judgment for the amount of the verdict. *Gordon* v. *City of Victoria*, 7 Brit. Col. L. R. 342.

See APPEAL, VI. 3—COURTS, V. 1—MASTER AND SERVANT, V. 1 — MINES AND MINERALS, I. 7 — STREET RAILWAYS, II. 1.

NEWSPAPER.

See DEFAMATION, 7.

NEXT FRIEND.

See HUSBAND AND WIFE, VII. 2.

NONSUIT.

See DEFAMATION, 7.

NOTARY.

Notice of action—*Letter.*]—A notary public is a public officer, and as such cannot be sued for damages arising from an act done by him in the exercise of his functions unless a month's previous notice has been given to him.—2. This notice is a special proceeding in the cause which should be served upon the defendant by means of a bailiff.—3. A simple letter, of which the plaintiff does not keep a copy, is not a notice of action within the meaning of the Code, and the contents of such a letter cannot be shewn orally.—4. Such a notice would not be necessary in a case where bad faith on the part of the defendant had been shewn. *Gervais* v. *Nadeau*, 3 Q. P. R. 18.

See COSTS, VII. 12.

NOTICE OF ACCIDENT.

See MASTER AND SERVANT, VI. 2—WAY, V. 2, VI. 7.

NOTICE OF ACTION.

See NOTARY—REVENUE, I. 2.

NOTICE OF MOTION.

See ACTION, 4—EVIDENCE, VI. 3—INTERPLEADER, 2, 3—MANDAMUS, 1—PEREMPTION, 7.

NOTICE OF TRIAL.

See TRIAL, VI.

NOTICE TO QUIT.

See LANDLORD AND TENANT, VIII.

NOVATION.

See LIMITATION OF ACTIONS, 12.

NUISANCE.

See WAY, VI. 2.

OATHS.

See MUNICIPAL CORPORATIONS, VIII. 5 —WITNESSES.

OPPOSITION.

1. Affidavit verifying.] — An affidavit accompanying an opposition to the seizure and sale of certain goods stating that "all and every one of the facts alleged in the above opposition are true to the best of my knowledge," and "this opposition is not made for the purpose of unjustly delaying the cause but with the object of obtaining justice," is sufficient, and meets the exigencies of Art. 642, C. P. *Beauchéne* v. *Fortin*, 2 Q. P. R. 513.

2. Renewal of—*Necessity for order—New opposant — Affidavit—Amendment.*]—After an opposition has been made and disposed of, a new one may be made by another party without the order of a Judge giving leave therefor; Art. 654 applies only where the second opposition is made by the same party.—2. It is not necessary for the affidavit in support of the opposition to set forth the occupation and domicil of the person making it, if the opposition itself does so. *Semble*, that an affidavit cannot be amended. *Davidson* v. *Noble*, 2 Q. P. R. 404.

See ASSESSMENT AND TAXES, VI. 2—ATTACHMENT OF DEBTS, I. 7—COSTS, IX. 8 — EXECUTION, III. — JUDGMENT, III. 2, 7, V. 7—PEREMPTION, 8.

OVERHOLDING TENANTS ACT.

See LANDLORD AND TENANT, X.

PARENT AND CHILD.

See GIFT, 4—INFANT, I., III. 1—MASTER AND SERVANT, VII.

PARLIAMENT.

See CONSTITUTIONAL LAW — PARLIAMENTARY ELECTIONS.

PARLIAMEMTARY ELECTIONS.

I. CORRUPT PRACTICES—PENALTY.
II. PETITION TO VOID ELECTION.
III. RECOUNT.

I. CORRUPT PRACTICES—PENALTY.

Remission in part.]—The applicant was convicted for corrupt practices committed at a Provincial election, and was fined $800, being the penalties attached by the Election Act. Upon his application for remission of the penalties, in whole or in part, the amount was reduced to $300. Special circumstances of the case considered. *In re Baker*, 20 Occ. N. 326.

II. PETITION TO VOID ELECTION.

1. Security—"*Current money of Canada.*"] — The petitioners, intending to comply with ss. 21 and 22 of the Manitoba Controverted Elections Act, R. S. M. c. 29, made a deposit with the prothonotary, consisting of Dominion notes, one for $500, one for $100, and 150 for $1 each, and got a receipt stating that the sum of $750 had been deposited as security "for the payment of all costs, charges and expenses which the Court shall award to be payable by the petitioners on the final disposal of the petition." On the hearing of preliminary objections it was shewn that the notes had been handed out by one bank to the petitioners' solicitor as Dominion notes in payment of a cheque; and that, after receiving them, the prothonotary deposited them in another bank, which received them as cash. The note for $500 was produced and indentified at the hearing, but the others had been paid out in the course of business and could not be traced :—*Held*, (1) that it was not necessary to prove that the notes were genuine and signed by the proper officials with the same strictness as would be required in proving other documents before the Court, and that the evidence adduced was sufficient *prima facie* to establish compliance with the Act; and (2) That the petitioners were not bound by the form of the receipt given by the prothonotary as to the purposes for which the security given was intended, as no receipt is required by the statute to be given. The money was paid in as security for costs in the matter, and ss. 21 and 22 of the Act make it security for all purposes therein referred to. *In re St. Boniface Election*, 20 Occ. N. 183, 281, 13 Man. L. R. 75.

2. Time for filing—*Return to clerk of council—Gazetting — Recount.*] — The returning officer having made his return to

the clerk of the executive council, pursuant to s. 196 of the Manitoba Election Act, R. S. M. c. 49, but without waiting for the result of a recount of which he had received notice, the clerk, as required by s. 200, published the election of the respondent in the next number of the Manitoba Gazette. The petition was filed on the last of the 30 days thereafter in accordance with s. 18 of the Manitoba Controverted Elections Act, R. S. M. c. 29. After the result of the recount was made known confirming the election of the respondent, the returning officer sent another return to the clerk of the executive council, which he duly gazetted, but this was more than six weeks after the filing of the petition :—*Held*, that the petition was regular, and that a preliminary objection based on the contention that the first return and gazetting of the election were void, and that only a petition filed after the second return would be good, should be overruled. *In re Rosenfeldt Provincial Election*, 20 Occ. N. 282, 13 Man. L. R. 87.

3. Trial—*Amendment.*]—At the trial of an election petition based on bribery, the petitioner asked for leave to amend by setting up that the election was void on the ground that the list of voters used at the election was compiled and signed by an unauthorized official, this fact having been discovered only after the commencement of the trial :—*Held*, that the amendment must be refused. *Martin* v. *Deane — North Yale Election Case*, 7 Brit. Col. L. R. 128.

III. Recount.

1. Marking of ballots — *Statutes—Directory.*]—By s. 46 of the Dominion Election Act, as amended by 58 & 59 V. c. 13, s. 4, the elector shall mark his ballot paper, " making a cross or crosses with a pencil on the white circular space or spaces opposite the name or names of the candidates for whom he intends to vote."—*Held*, following the *East York Case*, 32 C. L. J. 481, that this provision is directory only, and that ballots marked in the division containing the name of a candidate, though not in the white space, are good. *In re Winnipeg Dominion Election*, 20 Occ. N. 92.

2. Place of holding — *Appeal.*]—A recount before a Judge of the Superior Court of the votes given at a Dominion election is not a judicial, but a ministerial and executive proceeding.—There is no right of appeal from such a Judge's order concerning such a proceeding to the Court of Queen's Bench.—The Judge of the Superior Court to whom application is made for a recount of the votes is not bound to act in such a proceeding at the chef-lieu of the district, but can grant such application and issue his summons at any place. *Meigs* v. *Comeau*, 3 Q. P. R. 307.

PARTAGE.

See Heirs.

PARTICULARS.

I. Practice as to.
II. Right to.

I. Practice as to.

1. Default of delivery—*Dismissal of action.*] — Where a plaintiff has been ordered to give particulars of the damages which he claims, and neglects to do so, his action will be, on motion, dismissed with costs, saving the right to apply. *Lalonde* v. *Grand Trunk R. W. Co.*, 2 Q. P. R. 514.

2. Default of pleading—*Waiver.*]—A defendant who has not pleaded to the declaration within the time allowed must be held to have waived any irregularity in the declaration and to have accepted as sufficient the particulars given by the declaration, and it is, after the lapse of such time, too late to move for further particulars. *Rafferty* v. *Whelan*, 2 Q. P. R. 432.

3. Default of pleading—*Waiver.*]—A motion for particulars cannot be granted after the time for pleading to the merits has expired. *Clément* v. *Clément*, 2 Q. P. R. 453.

4. Insufficiency—*Time for moving.*]—If the defendant, having obtained an order for particulars of the plaintiff's demand, wishes to move against the particulars delivered on the ground of insufficiency, he must do so within three days after delivery. *Underwood* v. *Childs*, Q. R. 16 S. C. 412.

5. Motion for — *Deposit — Trial—Adjournment.*] — A deposit is required with a motion for particulars. Upon application, at the hearing, by the party moving for particulars, to be allowed to make such deposit, the *délibéré* will be discharged for that purpose. *Lalonde* v. *Grand Trunk R. W. Co.*, 2 Q. P. R. 449.

6. Motion for—*Order—Amendment of pleading—Costs.*]—A motion for particulars is not an answer to a pleading.

and a pleading can be changed or amended once without costs, without leave of a Judge, after service of notice of a motion for particulars of the original pleading, and even after an order for particulars.—Costs will be given upon a motion to strike out a paragraph of a pleading whereof particulars have been ordered and have not been furnished. *Codville* v. *Woods*, 3 Q. P. R. 233.

7. Order for—*Dies non juridicus—Enforcement pending appeal.*] — Particulars not having been delivered pursuant to an order, it was contended by the defendant that the order was bad, having been made on Dominion Day, and that it ought not to be enforced while an appeal against it was pending :—*Held*, that neither objection could prevail in these proceedings. An appeal is not a stay, and an order is good until reversed. It was ordered that the defendant should deliver the particulars within twenty days, so as to have them before the trial of the action, and, in default of delivery, that the paragraphs of the defence of which particulars had been ordered should be stricken out with costs. *Davey* v. *Bentinck*, [1893] 1 Q. B. 185, followed. *McLaughlin Carriage Co.* v. *Oland*, 20 Occ. N. 409.

8. Time for moving—*Pleading.*]—Where the defendant has allowed the delay for filing preliminary exceptions to elapse and has also been foreclosed from pleading to the merits, it is too late for him to move for further particulars of the plaintiff's demand. *Clément* v. *Clément*, Q. R. 16 S. C. 435.

II. Right to.

1. Adultery.]—In an action for separation from bed and board, an allegation stating that the defendant, since a certain time, has kept, and still keeps, a disorderly house, where she habitually commits adultery, is sufficiently particularized, and the plaintiff will not be bound to give the dates and places where, and to name the persons with whom, the defendant has committed adultery. *Clément* v. *Clément*, 2 Q. P. R. 453.

2. Agreement, written or verbal—*Costs.*]—Upon an allegation of a special agreement entered into between the parties whereby the defendant agreed to pay interest upon the amount of an account for goods sold, the plaintiff will be ordered, upon motion in that behalf, to state whether the agreement was in writing or oral; and if, at the hearing of the motion, the attorney of the plaintiff declares that such agreement was made orally, the motion for particulars made by the defendant will be granted as to costs only, and a certificate of such declaration will be given. *Brosseau* v. *Dechêne*, 3 Q. P. R. 109.

3. Agreement, written or verbal—*Date—Partnership dealings.*]—The statement of claim alleged a partnership and a dissolution, and claimed an account of the property and money of the co-partnership which had come into the hands or under the control of the defendant, under certain circumstances set out in the statement of claim :—*Held*, that the defendant was entitled to know whether the alleged partnership agreement was in writing, and the date, but, as the terms set out in the statement of claim alone constituted the plaintiff's claim, any other terms were not particulars of such claim, and the defendant could not obtain them in this way if he wishes to make them available for a defence. But the defendant was not entitled to particulars of the transactions in respect of which the plaintiff alleged that the defendant became possessed of partnership funds. They were not necessary to enable him to put in his defence. The first question to be decided was whether there had been a partnership which had been dissolved, and the next, the terms of it. If the partnership and the dissolution were admitted or proved, an order for accounting would follow as a matter of course, and these matters would come up before the Master. *Augustinus* v. *Nerinckx*, 16 Ch. D. 13, followed. *Forbes* v. *Pearson*, 20 Occ. N. 413.

4. Animal — *Injury by — Ownership—Provocation.*]—In an action for damages resulting from the biting of a dog, the defendant pleaded that the dog was her husband's property, and not hers, and further that the biting was due to the plaintiff's provocation. On motion for particulars as to the husband's ownership, and also as to the time and place of the alleged provocation :—*Held*, that the defendant was not bound to give particulars of her husband's ownership of the dog in question, the fact not being personal to her, and the plaintiff being able to obtain further information by examining the defendant for discovery.—2. That the provocation, in the absence of other particulars, is presumed to have occurred at the time and place where the plaintiff was bitten by the dog, and that, therefore, no further details were required. *Hugson* v. *Statton*, 2 Q. P. R. 559.

5. Attachment before judgment—*Concealment of goods.*]—A defendant sued by way of attachment before judgment can by motion demand and obtain particulars as to alleged acts of concealment or taking away of goods, etc., and the place, time, and nature of such acts. *Gaudet* v. *Mainville*, 2 Q. P. R. 382.

6. Bond—*Action on—Defences—Release by time given to principal—Ratification of breaches—Securities.*]—Action on a bond by the defendant as surety for another. The defendant pleaded that the plaintiffs had released him by giving time to the principal to make certain payments; that the plaintiffs had ratified and confirmed the breaches of the bond by their conduct towards the principal; and that the plaintiffs held certain securities for the payment of such sums as might be found due in the action. Particulars (1) of the occasions when time was given, and whether by a written instrument or otherwise, (2) of the acts of ratification and confirmation and the course of conduct relied on, (3) of the securities alleged by the defendant to be held by the plaintiffs, were ordered, *McLaughlin Carriage Co.* v. *Oland*, 20 Occ. N. 342.

7. Defamation — *Pleading — Justification.*]—Action for damages by an architect who alleged that the defendant had accused him of acting in a dishonourable manner in relation to certain tenders which he had communicated to the tenderers to the prejudice of the defendant. Among other defences the defendant alleged that it was justifiable to believe that the plaintiff had acted in an irregular manner. Upon a motion for particulars: — *Held*, that a defendant who pleads justification will be required to declare upon what facts the justification rests. *Tanguay* v. *Gaudry*, 3 Q. P. R. 255.

8. False audit—*Damages for.*]—In an action to recover damages because the defendant, being auditor of a bank, has certified false reports of the financial standing of the bank, the plaintiff alleging that he has accepted the position of director of the bank upon the faith of such reports, and that he has been called upon as director to pay a certain sum to indemnify the creditors and depositors of the bank, the defendant is entitled to particulars from the plaintiff shewing: what are the false items in such reports; how and at what dates the defendant has acknowledged his liability; when and to whom the plaintiff has paid the sum indicated—but the defendant cannot require to have indicated to him the exact figures of the items alleged to be false. *Préfontaine* v. *Martin*, 3 Q. P. R. 157.

9. Injury to person — *Damages — Motion—Costs.*]—The defendant in an action for damages for injury to the person is entitled to particulars where the plaintiff adds to his enumeration of the damages the words "et cætera."—2. In such action the plaintiff is not obliged to furnish details of the amount of damage which he alleges he has suffered in respect of his health, his enjoyment of life, and for medical expenses.—3. Where the motion succeeds only as to part of the particulars sought, the applicant is not entitled to costs. *McDonald* v. *Vineberg*, 3 Q. P. R. 206.

10. Mortgage — *Payments—Consideration—Proof of agency.*]—The action was to set aside a deed and for a declaration that two certain mortgages had been paid, or in the alternative for redemption. The defendants pleaded that the plaintiff, being bed-ridden for a number of years, had appointed one of the defendants his agent to transact business for him; that the consideration of one mortgage was money lent by the defendant M. to the plaintiff; that the defendant M. was assignee of the other mortgage; that he had given full consideration therefor to the mortgagee; and that he had also paid to the plaintiff the full consideration for the deed sought to be set aside. The plaintiff, on affidavit, denied knowledge of payments and consideration alleged :—*Held*, that the defendants should give particulars shewing whether the alleged authorization to the agent was in writing, and the date; also dates and items of money alleged to have been lent to the plaintiff, dates and items of payments for mortgage of which the defendant M. was assignee; and how, when, and in what manner the consideration for the deed mentioned in the statement of claim was paid. *Robert* v. *Miller* (No. 1), 20 Occ. N. 408.

11. Negligence—*Rule 278 (c).*]—The statement of claim alleged negligence by the defendants in the construction of a ditch along the highway in front of the plaintiff's land and neglect to keep such ditch in repair, in consequence of which a larger quantity of water was brought on to the plaintiff's land than would otherwise have naturally flowed thereon. On motion for particulars :—*Held*, that Rule 278 (c) was not applicable; it only applied to a case where a defendant would under the former practice be entitled as to course to an order for particulars. Although there seemed to be a tendency to grant orders for particulars in cases of tort more freely than formerly, there must still in each case be some special reason shewn why the order should be made. The bare statement that the absence of particulars embarrasses the defence, or that the defendants cannot frame their statement

of defence without the particulars, is insufficient. *Miller* v. *Rural Municipality of Westbourne*, 20 Occ. N. 394.

See BANKRUPTCY AND INSOLVENCY, II.—DEFAMATION, 2 — HUSBAND AND WIFE, VIII. 1—MUNICIPAL ELECTIONS, I. 4, 5, 8, 11—PLEADING, II. 4, IV.—SCHOOLS, 2.

PARTIES.

I. EXECUTORS AND TRUSTEES.
II. THIRD PARTIES.
III. OTHER CASES.

I. EXECUTORS AND TRUSTEES.

1. Addition of.]—The Court will not allow a party to be added to the cause before it is certain that the presence of the proposed party is necessary. And in an action by a creditor of a deceased person against his heirs or next of kin, the plaintiff was refused leave to add the supposed executors as defendants at a stage when it was undecided whether the next of kin would accept or renounce the succession. *Craig* v. *Heirs of Kenny*, 3 Q. P. R. 164.

2. Removal of executor—*Co-executors.*]—A testamentary executrix, usufructuary under a will, has no right, in an action taken to have her removed from her office of executrix on grounds of maladministration, neglect, and refusal to make an inventory, personal to herself, to ask, by dilatory exception, that the proceedings be stayed until her co-executor is made a party to the suit. *Augé* v. *Roy*, 2 Q. P. R. 431.

3. Trustee-plaintiffs—*Joinder.*]—An action is (as regards form) properly brought by four surviving trustees and the executors and trustees of the fifth (deceased) trustee, when their administration of the trust has been joint. *Kennedy* v. *Housman*, 2 Q. P. R. 515.

II. THIRD PARTIES.

1. Notice — *Agreement—Appearance.*]—The plaintiffs' claim against the defendants was for the balance of a sum agreed to be paid for the hire of a race-track. The defendants alleged that a ferry company had agreed to pay and contribute towards the hire of the track a certain sum for each day of the race meetings, in consideration of the increased travel, and that the defendants had thereby been induced to enter into the agreement with the plaintiffs:—*Held*, that this allegation was not sufficient to support a claim against the ferry company for contribution, indemnity, or any other relief over, within Rule 209; and therefore the defendants should not have been allowed to serve a third party notice:—*Held*, also, that the proper practice in moving against a third party notice, is to move without entering an appearance. *Windsor Fair Grounds and Driving Park Ass'n* v. *Highland Park Club*, 20 Occ. N. 98, 164, 19 P. R. 130.

2. Notice—*Service out of the jurisdiction — Partners.*]—After service of the writ, the defendant applied for and obtained, under Rule 60 of the Judicature Ordinance, 1898, N.-W. T., leave to issue a third party notice claiming contribution from the P. P. Co., and to serve the notice upon the company at the city of Winnipeg, in the Province of Manitoba. These proposed third parties were not an incorporated company, but were a partnership consisting of several partners, and were not carrying on business within the North-West Territories, but at the city of Winnipeg, in the Province of Manitoba, under the firm name of the P. P. Co. The notice was directed to them under that name, and not to the several partners as individuals, and was served upon a servant of the partnership, viz., their bookkeeper, at their Winnipeg office, and not upon any of the partners individually:—*Held*, that the order giving leave to issue the third party notice to a firm outside the jurisdiction, in the firm's name, was not authorized under Rule 60; (2) that in any case the notice should have been personally served upon the members of the firm. *Imperial Bank* v. *Hull*, 20 Occ. N. 291.

See APPEAL, V. 4.

III. OTHER CASES.

1. Heirs — *Service—Representation.*] — The service upon heirs by representation permitted by Art. 135, C.P., can only be made by designating one of the relations in his capacity of an heir, if he really is such, as representing the succession. *Andrews* v. *Frankenberg*, 3 Q. P. R. 45, Q. R. 17 S. C. 313.

2. Intervenant — *Creditor — Bank — Liquidation.*]—A creditor of a bank in liquidation may intervene in a suit pending between the liquidator and a debtor of the bank, where the success of the defence would have the effect of decreasing the dividend of the creditor. *Kent* v. *La Communauté des Sœurs de la Charité de la Providence*, 3 Q. P. R. 180.

3. Joinder of plaintiffs—*Contract.*]—An action may be brought by several

plaintiffs jointly for the recovery of a sum of money alleged to be due, under a contract with the defendant, in equal shares to each of the plaintiffs. *Leggatt* v. *McIndoe*, Q. R. 16 S. C. 413.

4. Municipal expenditure—*Suit by ratepayer—Demurrer — Attorney-General.*] —A ratepayer in a county filed a bill to restrain the county council from expending county funds in the erection of a new gaol building on lands not included in the locus authorized by statute as a site for a county gaol:—*Held*, on demurrer, that the plaintiff could not maintain the suit in his own name, as the bill did not allege any damage or invasion of any right peculiar to himself and not common to all other ratepayers, and that the suit should have been in the name of the Attorney-General on the relation of some person. Leave given to convert the bill into an information by the Attorney-General by way of amendment. *Curtis* v. *Municipality of Carleton*, 20 Occ. N. 18.

5. Several plaintiffs—*Joint action—Exception — Different defences.*]—Several plaintiffs have a right to bring a joint action whereby each claims an equal share of the sum alleged to be due by the defendant under a simple contract, and the defendant will not be allowed to plead, by exception to the form, that he cannot set up against the plaintiffs the different defences which he may have against each of them. *Leggat* v. *McIndoe*, 2 Q. P. R. 399.

See ASSESSMENT AND TAXES, VI. 2—CHURCH, 2 — COSTS, II.—COVENANT — FRAUDULENT CONVEYANCE, 2 — HUSBAND AND WIFE, I., VII. 2 — INTERPLEADER, 1—MECHANICS' LIENS, II. 3, III. 5—MORTGAGE, II. 3, 4—MUNICIPAL ELECTIONS, II. 1—PARTITION, 2—PARTNERSHIP, II. 3—PEREMPTION, 2—PLEADING, II. 1, V. 4—REVIVOR, 1—STAY OF PROCEEDINGS, 5—TRIAL, III. — TRUSTS AND TRUSTEES, 1—WAY, VIII. 1.

PARTITION.

1. Tenants in common — *Statute of Limitations — Possession.*] — Under the Nova Scotia Statute of Limitations, R. S. N. S., 5th ser., c. 112, a possession of land, in order to ripen into a title and oust the real owner, must be uninterrupted during the whole statutory period. If abandoned at any time during such period, the law will attribute it to the person having title. Possession by a series of persons during the period will bar the title, though some of such persons were not in privity with their predecessors. Where one of two tenants in common had possession of the land as against his co-tenant, the bringing of an action of ejectment in their joint names and entry of judgment therein gave a fresh right of entry to both, and interrupted the prescription accruing in favour of the tenant in possession. Judgment in 32 N. S. Reps. 1, affirmed. *Archibald* v. *Handley*, 20 Occ. N. 111, 30 S. C. R. 130.

2. Summary proceeding—*Parties—Absentee—Guardian — Service — Substitution.*]—Where, in a proceeding for partition or sale of lands, begun by summary application, a person interested in the estate, not originally made a party, had been long unheard of, and there was uncertainty whether he were living or dead, an order was made by a Judge, under ss. 16 to 20 of the Partition Act, R. S. O. c. 123, which are expressly made applicable by s. 33 of the Judicature Act, R. S. O. c. 51, appointing a guardian and directing that he be served with an office copy of the judgment or order for partition, and notice, for the absentee. *Semble*, that the Master to whom a reference is directed by the judgment or order has power to dispense with service of his warrant or of an office copy of the judgment: Rules 203, 659. *Smith* v. *Houston*, 15 P. R. 18, discussed. *Semble*, also, that the Court or a Judge has power to make an order for substituted service of an office copy of a judgment or order. *In re Hynes—Hodgins* v. *Andrews*, 20 Occ. N. 390, 19 P. R. 217.

See ADMINISTRATION, 1.

PARTNERSHIP.

I. AGREEMENT—CONSTRUCTION.
II. DISSOLUTION.
III. PRACTICE.
IV. OTHER CASES.

See CHOSE IN ACTION, 3—CONTRACT, I. 4—PARTICULARS, II. 3—PARTIES, II. 2—SOLICITOR, II.

I. AGREEMENT—CONSTRUCTION.

1. Continuance after expiry of term—*Deceased partner—Purchase of share—Discount—Good-will.*]—A deed, providing for a partnership during seven years from its date, provided for purchase by the survivors of the share of a deceased partner, with a special provision that if one partner, K., should die, the value of his share should be subject to a discount of twenty per cent. After the seven years had expired, the partners continued the business by verbal agreement for an indefinite period, and, while

it so continued, K. died:—*Held*, that, even if the parties had not admitted that the business was continued under the terms of the partnership deed, such terms would still govern, as there was nothing in the deed repugnant to a partnership at will; that the surviving partners had, therefore, a right to purchase the share of K., and to be allowed the deduction of twenty per cent. therefrom, as the deed provided; and that, in the absence of any stipulation in the deed to the contrary, the good-will of the business and K.'s interest therein should be taken into account in the valuation to be made for such purpose. *Hibben* v. *Collister*, 20 Occ. N. 325.

2. Losses—*Contribution inter se.*]—By an agreement between the plaintiffs and defendant it was provided that the defendant, who was carrying on the business of manufacturing wire fencing, should furnish machines, in which he had patent rights, for the purpose of carrying on the business of manufacturing and selling wire fencing; that he should devote his time and energy to furthering the interests of the business; that the machines and patent rights therein should be security for money advanced by the plaintiffs; that the plaintiffs should advance to the defendant $500, purchase wire needed for manufacturing, and pay wages, etc., in consideration of a commission of five per cent. on all purchases and advances; that the plaintiffs should furnish space on their premises for the business at a yearly rent; that the defendant should receive a weekly salary; that the plaintiffs should attend to the office work of the business, for which they should be paid a weekly sum; that the net profits of the business should be divided; that the business should be conducted under a company name; and that the agreement should continue for one year, when the plaintiffs could purchase a half interest in the business and patent rights of the defendant or continue the business for a further term. The business resulted in a loss:—*Held*, that the parties were partners *inter se*, and should share equally in the losses of the business. *Lawton Saw Co.* v. *Machum*, 2 N. B. Eq. Reps. 112.

II. Dissolution.

1. Action for account—*Pleading.*]—In an action for an account between partners of a dissolved partnership, where certain assets are in possession of the defendant since the dissolution, it is not necessary for the plaintiff to allege in his declaration that he has rendered an account to the defendant, at any time, relative to the affairs of the dissolved partnership. *Sheridan* v. *Heffernan*, 2 Q. P. R. 491.

2. Action for account — *Previous rendering.*]—Where, after the dissolution of a partnership by mutual consent, one of the partners was intrusted with the collection of debts due to the firm, the rendering of an account of the amounts collected by him is a condition precedent to the exercise of his right to an account against his copartner. *DeGagné* v. *Pigeon*, Q. R. 17 S. C. 308.

3. Funds in bank—*Parties.*]—In an action to dissolve a partnership, the only means of bringing the facts which give rise to the dissolution to the knowledge of the bankers in whose hands are deposited the funds of the society is by making the bankers parties to the action. *Bouchard* v. *Plamondon*, Q. R. 16 S. C. 483.

III. Practice.

1. Incorporated company—*Pleading—Reply—Departure.*]—Action against two men, jointly and severally, charging them as having carried on business under the firm name of the "C. P. & L. Co.," to recover the amount of a bill of exchange accepted in the name of the company by its president (one of the defendants) and secretary (not a defendant). The defendants pleaded denying the alleged partnership, alleging that the company was duly incorporated, and that it only was liable to the plaintiff. The plaintiff replied that the company was composed in reality of the two defendants only, who were incorporated to limit their liability to creditors:—*Held*, that the plaintiff could not thus by reply attack the letters patent incorporating the company, when their cancellation was not originally asked in the action. *Blois* v. *Fortier*, 3 Q. P. R. 254.

2. Style of cause—*Firm name—Amendment.*]—Summons by the plaintiffs for summary judgment under Order XIV. Objection that Jacob Sehl was really the plaintiff, and he was suing in a firm name when he was the only member of it (*Mason* v. *Mogridge*, 8 Times L. R. 805, upheld, and an adjournment to enable plaintiff to apply to amend the style of cause in the proceedings, refused. [See also *Lang* v. *Thompson*, 16 P. R. 516.] *British Columbia Furniture Co.* v. *Tugwell*, 20 Occ. N. 144, 7 Brit. Col. L. R. 84.

IV. Other Cases.

1. Agency — *Factor—Pledge—Lien—Notice—Res judicata.*]—A partner intrusted with possession of goods of his firm for

the purpose of sale may, either as partner in the business or as factor for the firm, pledge them for advances made to him personally, and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods, notwithstanding notice that the contract was with an agent only. Where a consignment of goods has been sold and they remain no longer in specie, the only recourse by a person who claims an interest therein is by an ordinary action for debt, and he cannot claim any lien upon the goods themselves nor on the price received for them. The plea of *res judicata* is good against a party who has been in any way represented in a former suit deciding the same matter in controversy. *Dingwall* v. *McBean*, 20 Occ. N. 374.

2. Contract — *Breach—Action by one partner—Damages—Amendment.*]—A plaintiff who is proved to be member of a partnership cannot sue alone for a partnership debt. 2. Even if it is proved that the plaintiff and his partner were to divide equally the profits arising out of a certain contract, for the purposes of which the plaintiff and his partner were associated, the plaintiff cannot, without further proof as to the respective shares of the partners in the said partnership, obtain judgment for one-half of the damages arising out of the breach of the contract by the defendant, the plaintiff claiming damages on many grounds, some of which are personal to himself. 3. In an action for damages brought by a person having a contract, with the Government to supply it with certain uniforms, against the person who was to supply the cloth for the said uniforms, the plaintiff cannot claim any damages arising from the fact that through the defendant's default of putting him in a position to fulfil his contract, he lost the confidence of the Government, and did not obtain from it any other contracts afterwards, — the said damages being too remote to be easily foreseen by the defendant. 4. *Semble*, that the plaintiff, in that case, will not be allowed, after the hearing, to amend his declaration by adding thereto allegations stating that he bought certain goods in connection with the execution of the said contract, had them cut and trimmed with a view to use them as soon as the defendant would furnish the necessary materials, — where the defendant, at the hearing, had objected to that proof as setting a new item of damage, and forcing him to meet a proof which he was unprepared to meet. *Marsolais* v. *Willett*, 2 Q. P. R. 409.

3. Contract—*Judgment—Acceptance as payment — Interest.*]—The defendant P. made a sub-contract with C., who had a railway construction contract, to do the fencing, and P. took the defendant M. into partnership with him to carry out the sub-contract, and then sublet to the plaintiffs. C. recovered a judgment declaring that he had a lien on the railway for the amount due him, and by that judgment the railway company were ordered to pay P. $8,400, P. "hereby accepting the provisions of this judgment in full of his claim" against C. This was in 1891, and the $8,400 was not paid till 1898:—*Held*, that, as the original contract was between P. and C., and P. was the one with whom C. dealt, M. must be held to have been bound by P.'s acceptance of the judgment, just as he could have been by a payment made by C. to P. At the time the judgment was taken, the plaintiffs had done all the work under their contract to the satisfaction of the engineer in charge, and P. was entitled to have had a final estimate and payment of the balance. He alleged that the engineer was withholding the final estimate, so that an action could not be brought against C.; if, under the circumstances, P. chose to accept the judgment against the company in full satisfaction of his claim against C., it seemed only reasonable that it should be considered as between him and the plaintiffs that he was then paid the balance that was due on the contract; and therefore the plaintiffs were entitled to interest for six years, for, although the contract did not specify the day of payment, it specified the event upon which payment was to be made, and that was sufficient. *Sinclair* v. *Preston*, 20 Occ. N. 359.

4. Holding out—*Estoppel — Ratification.*]—Goods were ordered from the plaintiff by O. as for the firm of O. & T. and received by O., but there was in fact no partnership. T., however, after the goods had been given to O., went to the plaintiff's store, and by his conversation led the plaintiff to believe that there was a partnership:—*Held*, that T. was not estopped from shewing the fact to be otherwise, but that he had ratified the agency of O., and the plaintiff was entitled to succeed. *Grady* v. *Olsen*, 20 Occ. N. 193.

5. Lands of—*Transfer to one partner—Alienation—Cancellation of lease.*]—A partnership had made a lease of land with a stipulation that in case of sale the lease should be cancelled after notice. The firm being afterwards dissolved, a transfer of this land was made by the firm to the plaintiff, one of the partners, who engaged to pay a sum of money to the other partner and to pay the debts of the firm:—*Held*, that the plaintiff must be regarded as having

been the owner when the lease was executed. The transfer of the land to him had only the effect of confirming his right. Therefore it was not an alienation, and the event upon which cancellation of the lease could be ordered had not taken place. *Langlois* v. *Dubray*, Q. R. 17 S. C. 328.

6. Purchase of goods by partner—*Ratification.*]—Where one of two partners, without the knowledge of the other, purchases goods in his own name or in the name of a firm which he expects to form afterwards in partnership with some other person, intending to exclude the other partner from the contract, the latter cannot be made liable upon the contract by ratification afterwards, although the old partnership is continued and the goods are subsequently taken into stock and disposed of for the benefit of the firm. A man cannot be made a party to a contract unless he who assumes to contract does so on behalf of that man; and no ratification can be effectual unless the act has been done by the agent on behalf of the party who ratifies, or, in other words, there can be no binding ratification by a person not contemplated by the agent as his principal at the time of entering into the contract. *Watson* v. *Swann*, 11 C. B. N. S. 771, and *Vere* v. *Ashby*, 10 B. & C. 288, followed. *Durant* v. *Roberts*, [1900] 1 Q. B. 629, distinguished. *Fraser* v. *Sweet*, 20 Occ. N. 283, 13 Man. L. R. 147.

7. Purchase of partner's interest by co-partners—*Errors in statements—Fraud.*]—In order to avoid a dissolution of partnership and a winding-up of the business, the interest of a partner in the partnership assets was purchased by his co-partners for an amount equal to the profits standing at his credit, his salary to the time of the purchase, and a percentage of his capital as shewn in the last yearly balance sheet, which was based upon statements prepared under the supervision of this partner. More than two months after the transaction the plaintiffs brought this action, alleging that part of the stock-in-trade had been overvalued in the statements, and claiming repayment of part of the purchase money:—*Held*, upon the evidence, that the purchase price was arrived at as a compromise, and not as an arbitrary proportion of definite items, but that, apart from this, as the statements had been prepared in good faith and in accordance with the uniform usage of the business, the defendant was not liable. *Stroud* v. *Wiley*, 20 Occ. N. 398, 27 A. R. 516.

PARTY WALL.

See FENCES—TRUSTS AND TRUSTEES, 5.

PASSENGERS.

See RAILWAYS AND RAILWAY COMPANIES, VIII., XII.

PATENT FOR INVENTION.

1. Combination — *Infringement.*]—A patent for a mechanical combination which produces a new result is infringed if the combination is taken in essence and in substance. *Short* v. *Federation Brand Salmon Canning Co.*, 7 Brit. Col. L. R. 197.

2. Contract — *Sale of patent — Future improvements—Money paid—Recovery back.*]—By contract under seal M. agreed to sell to B. and S. the patent for an acetylene gas machine, for which he had applied, and a caveat had been filed, and also all improvements and patents for such machine that he might thereafter make, and covenanted that he would procure patents in Canada and the United States and assign the same to B. and S. The latter received an assignment of the Canadian patent, and paid a portion of the purchase money, but when the American patent was issued it was found to contain a variation from the description of the machine in the caveat, and they refused to pay the balance, and in an action by M. to recover the same they demanded, by counterclaim, a return of what had been paid on account:—*Held*, that the agreement was not satisfied by an assignment of any patent that M. might afterwards obtain; that he was bound to obtain and assign a patent for the machine described in the caveat referred to in the agreement; and that, as the evidence shewed the variation therefrom in the American patent to be most material, and to deprive the purchasers of a feature in the machine which they deemed essential, M. was not entitled to recover:—*Held*, further, that, as B. and S. accepted the Canadian patent and paid a portion of the purchase money in consideration thereof, and as they took the benefit of it, worked for their own profit, and sold rights under it, they were not entitled to recover back the money so paid as money had and received by M. to their use. *McMurray* v. *Bingham*, 20 Occ. N. 50, 30 S. C. R. 159.

3. Expiry of foreign patent—*Meaning of "foreign patent"—"Exists."*]—J. filed an application for a Canadian patent for new and useful improvements in boiler and other furnaces on the 1st March, 1892. On the same day he applied for a British patent and also for an Italian patent in respect of the same invention. The British application was accepted on the 30th April, 1892, and the patent issued on the 12th July, but

was dated, as is the practice in England, as of the date of the application, viz., the 1st March, 1892. The Italian patent was issued on the 19th March, 1892, and was granted for a term of six years from that date. The Canadian patent was granted on the 15th October, 1892. The British patent became forfeited for non-payment of certain fees and annuities due thereon on the 1st March, 1897. The inventor was in default in respect of payment of fees on the Italian patent in 1895, and while there was some doubt whether such default operated as a forfeiture *ipso facto* under the Italian law, there was no doubt that it expired at the end of the six years when no steps were taken by the inventor for its renewal:—*Held*, that the Canadian patent was void. 2. That the words "foreign patent" as used in R. S. C. c. 61, s. 8, as amended by 55 & 56 V. c. 24, s. 1, include all patents that are not Canadian. 3. That the word "exists" therein has reference to the date or time when the Canadian patent is granted, not when it is applied for. 4. That the words "shall expire at the earliest date on which any foreign patent for the same invention expires" are not to be limited to the expiration by lapse of time of the potential term of the foreign patent, but include any ending at a time earlier than the end of the term for which the patent is granted. *General Engineering Co. of Ontario* v. *Dominion Cotton Mills Co.*, 20 Occ. N. 274, 6 Ex. C. R. 357.

4. Furnace stoker—*Combination—Infringement.*]—On the 15th October, 1892, J. obtained a patent in Canada for alleged new and useful improvements in boiler furnaces. The distinctive feature of J.'s invention was that, instead of using a fuel chamber or magazine bowl-like in shape, such as that claimed in Worthington's United States patent, he employed an oblong trough or bath-tub shaped fuel chamber, with upwardly and outwardly inclined closed sides. This form of fuel chamber was suggested in the Worthington patent, but was not worked out by its inventor, it being his view, apparently, that several magazines or chambers bowl-like in shape could be used within the trough-shaped chamber. The Worthington patent was not commercially successful. J., using an oblong or trough-shaped chamber, was the first to manufacture a mechanical stoker that was commercially successful. Between Worthington's and J.'s patents there was all the difference between failure and success:—*Held*, that J.'s patent was valid. *General Engineering Co. of Ontario* v. *Dominion Cotton Mills Co.*, 20 Occ. N. 52, 6 Ex. C. R. 309.

5. Scire facias to repeal—*Expiry of foreign patent — "Cause as aforesaid."*]—Upon a proceeding by *scire facias* to set aside a patent for invention because of an alleged expiry of a foreign patent under the provisions of s. 8 of the Patent Act:—*Held*, that there was so much doubt as to that being one of the clauses included in the expression "for cause as aforesaid" in clause 2 of s. 34 of the Act, that the action should be dismissed. *Regina ex rel. American Stoker Co.* v. *General Engineering Co. of Ontario*, 20 Occ. N. 53, 6 Ex. C. R. 328.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 10—EVIDENCE, VII. 1—INJUNCTION, II. 2.

PAUPER.

Leave to sue as—*Requisites—Frivolous action.*]—Permission to proceed *in forma pauperis* ought not to be refused by a Judge unless he is convinced that the party applying has the necessary means for payment of disbursements, or unless her demand is plainly frivolous and vexatious. — A demand is not necessarily frivolous and vexatious because the party has signed a writing releasing it, where he declares on oath that he was induced to do so by false representations. *Paquette* v. *Pyke*, 2 Q. P. R. 364.

See COSTS, IX. 6.

PAWN.

See PLEDGE.

PAYMENT.

See BANKRUPTCY AND INSOLVENCY, III. —PRINCIPAL AND SURETY, 1—SALE OF GOODS, I.—SOLICITOR, V.

PAYMENT OF MONEY INTO COURT.

See ATTACHMENT OF DEBTS, I. 10—COSTS, III. 3, 4, VI. 1, IX. 4—INFANT, III. 2—MUNICIPAL CORPORATIONS, XVI. 1 — SALE OF GOODS, VI. 2.

PAYMENT OF MONEY OUT OF COURT.

Proof of age of applicant—*Majority.*]—By decree of the 18th September, 1878, in a partition action, it was directed that the share of an infant defendant, J. F. M., should remain in

Court, and the interest thereon should be paid to his father, a co-defendant, as tenant by the curtesy. On the 24th September, 1900, J. F. M. and his father moved for payment out of J. F. M.'s share, upon the father's affidavit identifying the infant defendant as his son, J. F. M., and stating that J. F. M. was of age, having reached the age of twenty-one years on the 5th February, 1899, and that the father consented to payment out and released all his rights in the fund:—*Held*, that the proof of the age was not sufficient, the father not having stated his reasons for believing that the son was of age or referred to any family or other records in support of his statement, and the fact that the son was named as a party in the decree of the 18th September, 1878, was not conclusive proof that he was now of age. *Tolton* v. *MacGregor*, 20 Occ. N. 391.

See APPEAL, XV. 3—LIMITATION OF ACTIONS, 8.

PENALTY.

See PARLIAMENTARY ELECTIONS, I. — REVENUE, I. 1—STATUTES, III.

PEREMPTION.

1. Counterclaim.] — An incidental cross-demand is subject to a peremption distinct from the principal demand. *Comte* v. *Pfister*, 3 Q. P. R. 182.

2. Death of plaintiff — *Parties.*] — When, upon notice of the motion for peremption of a suit, but before such motion is taken into consideration, the attorneys of the plaintiff produce a declaration of his death, judgment cannot be given upon the motion for peremption until the representatives of the plaintiff have been added as parties. *Macadam* v. *Thompson*, Q. R. 16 S. C. 362.

3. Discontinuance—*New Code, P.Q.*]—When the discontinuance of proceedings in a cause has commenced while the old Code of Civil Procedure is in force, the suit is not barred until this interruption has lasted for three years, even when the two years required by Art. 279 of the new Code have completely passed since the coming into force of that Code. *Chanteloup Mfg. Co.* v. *Berger*, Q. R. 16 S. C. 482.

4. New Code, P.Q.]—The provision of Art. 279, C. C. P., concerning peremption, applies to a case which was pending at the time the present Code came into force, provided the entire time required by such article for the peremption has run after the coming into force of the new Code. *Couture* v. *Duclos*, Q. R. 16 S. C. 554.

5. New Code, P.Q.—*Acquisition of peremption.*]—The provisions of the new Code of Procedure apply to a *peremption* entirely acquired since it came into force, especially in a case where no peremption had commenced to run prior to its coming into force. *Matte* v. *Massicotte*, 2 Q. P. R. 398.

6. Non-return of writ of summons.]—Where a suit lapses by the non-return of the writ of summons, there is no suit which can be declared peremped. *Ormstein* v. *Weiss*, 2 Q. P. R. 406, Q. R. 16 S. C. 624.

7. Notice of motion.]—A motion for *péremption d'instance* presented the day after notice thereof will be dismissed with costs, the notice being illegal and insufficient. *Archambault* v. *Grand Trunk R. W. Co.*, 2 Q. P. R. 407.

8. Onus—*Opposition to judgment.*]—The opposition to judgment being considered as a defence to the original suit, the opposant is the defendant in the cause, and it belongs to him to move for peremption, if no proceedings have been taken thereunder during the delay necessary to acquire peremption. *Gilmour* v. *Odell*, Q. R. 17 S. C. 237.

9. Useful proceeding.]—The service of a notice of setting down for *enquête* when the cause cannot properly be set down except for *enquête et mérite*, is not a useful step in the cause sufficient to interrupt the *peremption d'instance*. *Barthe* v. *Genest*, Q. R. 16 S. C. 339.

See CERTIORARI, 5—JUDGMENT, III. 6—SOLICITOR, II. 1, 2—STATUTES, V. 2.

PETITION.

Demurrer—*Formal objection — Exception.*]—A person cannot, by way of demurrer, allege that a petition asking the revision of a sentence of interdiction pronounced by the prothonotary is not well founded, because the petitioner ought to have proceeded by writ of summons and not by petition, such a ground being a formal ground and such as can be set up only by way of exception to the form. *Bond* v. *Barry*, Q. R. 16 S. C. 364.

See PLEADING, IV.—REVIVOR, 1.

PETITION OF RIGHT.

See CROWN, III. 1, IV. 6.

PHOTOGRAPHS.

See DISCOVERY, II. 2, IV. 3.

PHYSICIANS AND SURGEONS.

See LIMITATION OF ACTIONS, 5—MEDICAL PRACTITIONER.

PILOTS.

See CERTIORARI, 3, 4—CROWN, IV. 5.

PLANS AND SURVEYS.

See MINES AND MINERALS, I. 1—MUNICIPAL CORPORATIONS, VI. 2—WAY, II. 2, 3, 4, VII. 1.

PLEADING.

I. COUNTERCLAIM.
II. DECLARATION.
III. EXCEPTIONS.
IV. PETITION.
V. PLEAS.
VI. REJOINDER.
VII. REPLY.
VIII. STATEMENT OF CLAIM.
IX. STATEMENT OF DEFENCE.

See BANKRUPTCY AND INSOLVENCY, III. 1 — DISCOVERY—DOMICIL—EXECUTORS AND ADMINISTRATORS, 9—LIMITATION OF ACTIONS, 2 — PARTICULARS — PARTNERSHIP, III. 1—PRINCIPAL AND AGENT, 5—SALE OF GOODS, VII. 2—STATUTES, III. 1 — TRADE-MARK AND TRADE-NAME, 3—TRESPASS, I.—VENUE—VOLUNTARY ASSOCIATION—WAY, IV. 4—WILL, III. 5.

I. COUNTERCLAIM.

Quality of goods—*Prejudice.*]—In an action for the price of goods sold and delivered the defendant made an incidental cross-demand for damages for non-delivery of the remainder of the goods purchased:—*Held*, that allegations that the goods which the defendant had to procure elsewhere owing to the default of the plaintiff were of an inferior quality to those of the plaintiff were sufficiently definite not to prejudice or embarrass the plaintiff, and should not be struck out upon exception to the form. *Hart* v. *Timossi*, 3 Q. P. R. 58.

See COSTS, V. 1—JUDGMENT, IV. 3—MORTGAGE, II. 1—PEREMPTION, 1.

II. DECLARATION.

1. Absence of claim — *Particulars.*]—Failure to make any claim against a *mis-en-cause* is a good ground for an *exception à la forme* by the *mis-en-cause*. *Chaussé* v. *Houle*, 3 Q. P. R. 179.

2. Amendment—*Writ of attachment—Affidavit.*]—The plaintiff was allowed, on paying the costs of an exception to the form, to amend the conclusions of his declaration so as to make them conform to the allegations of the affidavit upon which the writ of *saisie-conservatoire* with which the action began was issued, and also to furnish the defendant with a copy of such affidavit. *Biron* v. *Tanguay*, 2 Q. P. R. 393.

3. Matter for reply—*Moving against.*]—Where allegations necessary to sustain the demand are made in the reply instead of in the declaration, objection should be taken by way of exception to the form, and not by demurrer.—2. Upon a demurrer it was ordered that evidence should be given before the determination of the law. *Imperial Bank of Canada* v. *Quinn*, 2 Q. P. R. 396.

4. Title to note — *Particulars.*]—If a plaintiff does not set forth sufficiently in detail in his declaration the manner in which he became holder and owner of the note sued on, the defendant's recourse is by *exception à la forme* or motion for particulars and not by demurrer, if the allegations of the declarations are sufficient in law to justify the conclusions. *Abbott* v. *Jamieson*, 3 Q. P. R. 177.

See MUNICIPAL ELECTIONS, I. 4 — WRIT OF SUMMONS, III. 2.

III. EXCEPTIONS.

1. Deposit — *Notice.*] — An exception to the form not accompanied by a notice that the necessary deposit has been made will be dismissed. *Garaud* v. *Rolland*, 2 Q. P. R. 397.

2. Deposit — *Technical objection.*]—A motion to compel a party to number consecutively the allegations of a pleading is in the nature of a preliminary exception, and will be dismissed if it is not accompanied by the deposit required by Art. 165, C. P. *Le Blanc* v. *Pausé*, 2 Q. P. R. 394.

See IV., V. 1, 2, 4.

IV. PETITION.

Opening publication—*Necessary details—Exception—Amendment—Costs.*] — A petition to reopen the proceedings in an

action for damages by reason of an accident, dismissed upon contradictory evidence, upon the ground that the plaintiff has discovered a new witness who can say how the accident happened, without alleging other details, should be attacked by exception to the form, and not by answer in law.—2. In such a case the plaintiff will be allowed to amend in order to shew, in substance, what the new witness can tell, and costs will be reserved. *Lefebvre* v. *Dominion Wire Mfg. Co.*, 2 Q. P. R. 497.

V. Pleas.

1. Acceptance of jurisdiction — *Subsequent declinatory exception—Bill of lading.*]—A defendant by pleading to the merits accepts the jurisdiction of the Court, and cannot afterwards maintain a declinatory exception.—The action was for the recovery of certain goods intrusted to a steamship company; the defendants pleaded to the merits; the plaintiff replied disputing the validity of certain clauses in the bill of lading; and the defendant then, by declinatory exception, objected to the jurisdiction on the ground that it was provided in the bill of lading that all disputes regarding it were to be decided before the Courts of a foreign country:—*Held*, that the exception was not maintainable. *Ramsay* v. *Hamburg-American Packet Co.*, 2 Q. P. R. 406.

2. Defence in law—*Setting down—Irregularities — Exception à la forme.*]—A defendant who, instead of demurring according to Art. 192, C. P. C., files a defence in law in the form in use under the old Code, and afterwards sets down such defence for hearing, thereby makes his procedure regular, and the plaintiff, not being prejudiced thereby, cannot ask to have the defence in law set aside.—2. The principle of Art. 174, C. P. C., that the defendant may invoke, by way of exception to the form, when they prejudice him, grounds resulting from irregularities in the writ, the declaration, and the service, is applicable also to every other proceeding in the cause. *Montreal Park and Island R. W. Co.* v. *Town of St. Louis*, Q. R. 16 S. C. 335.

3. Denial — *Inconsistency — Striking out.*]—A plea denying each and every of the allegations of the declaration in such manner as would force the plaintiff to prove them all, is exclusive of a second plea denying some of the counts only, and stating that the others are compensated, and a motion to reject the latter plea will be granted, unless the defendant consents to withdraw his first plea or modify it so as to put it in accordance with the second defence. *Brulotte* v. *Giard*, 2 Q. P. R. 450.

4. Dilatory exception — *Time — Defence au fonds — Parties — Executors.*]—A defendant who has obtained leave to defer pleading until an exhibit in support of the plaintiff's demand be produced may plead a dilatory exception during the three days which follow the production of the exhibit.—2. The fact that the grounds of a dilatory exception may be pleaded so as to go to the root of the action does not prevent the defendant from pleading them by way of exception.—3. A testamentary executrix whose removal is sought on account of bad administration has the right to demand, by way of dilatory exception, that her co-executors shall be made parties. *Carrière* v. *Roy*, 2 Q. P. R. 402.

5. General denial—*Special plea.*]—In certain cases a denial in the nature of a general denial may be pleaded with a special defence. *Huot* v. *Doucet*, 3 Q. P. R. 137.

6. Offer of money — *Condition—Demurrer.*] — Offers of money made in pleadings by virtue of Art. 1162, C. C., cannot be struck out on demurrer.—2. Such offers may be conditional.—3. The value of such offer cannot be adjudicated upon until judgment is given upon the merits. *Menier* v. *Whitling*, 2 Q. P. R. 387.

7. Offer of money—*Set-off.*]—A defendant cannot plead that he has offered the sum demanded without alleging that he has ever since been ready to pay it and renewing the offer in his pleading, and such a plea will be struck out on demurrer.—2. Allegations in the defence seeking to set off against the plaintiff's money demand under a notarial instrument and a promissory note, a claim by the defendant against the plaintiff for unliquidated damages arising out of an entirely different transaction, are bad and will be struck out on demurrer. *King* v. *Lepitre*, 2 Q. P. R. 429.

VI. Rejoinder.

Vagueness.]—A rejoinder in which a defendant denies all the new facts alleged in the reply of the plaintiff and which do not corroborate the allegations made in the defence, is too vague and will be struck out on motion. *Rousseau* v. *King*, 2 Q. P. R. 408.

VII. Reply.

1. Assumpsit.]—To an action of assumpsit the defendant pleaded payment. The plaintiff's reply contained allegations to the effect that the defendant had

definitely acknowledged the balance sued for, and had agreed that, if he should fail to make any monthly payment within three days after it should become payable, the entire balance should be immediately exigible:—*Held*, that the allegations were relevant, and were not such as should have been made in the declaration. *Ness* v. *Candlish*, Q. R. 17 S. C. 194.

2. Departure.] — Issue having been joined by the defence, the plaintiff cannot in replying bring forward new facts to add them to his demand. *Lapointe* v. *Carpentier*, 3 Q. P. R. 141.

3. Leave to reply — *Time expired—Merits.*]—Decision of Henry, J., 19 Occ. N. 400, reversed, on the ground that he acted on a wrong principle in refusing the plaintiff leave to reply. The plaintiff should have been allowed to take the $1 out of Court and proceed to trial to see if she were entitled to any more. *Miller* v. *Archibald*, 20 Occ. N. 136

4. Vagueness—*Striking out.*]—A general rejoinder denying all and every of the new facts alleged in a special reply, in so far as they contradict those of the defence, will, upon motion, be struck out of the record. *Rousseau* v. *King* (1899), C. C. Q. 3901, followed. *Lemay* v. *Nadeau*, 3 Q. P. R. 120.

See *ante*, II. 3.

VIII. Statement of Claim.

Striking out—*Cause of action—Amendment—Limitation of actions—Railway Act.*] —Section 125 of the Judicature Ordinance, R. O. 1888 c. 58, can be invoked only (1) when the whole pleading, and not merely "matter in the pleading" within s. 103, is attacked; and (2) when the pleading discloses not merely no cause of action or answer but one not reasonable, that is, not fairly open to argument as a point of law, or when the action or defence is shewn by the pleadings to be frivolous or vexatious. If it is fairly open to argument whether a pleading discloses a good cause of action or answer, the question involved should be raised as a point of law by the pleadings under s. 123. On the pleadings it was objected that the amended statement of claim set up a new cause of action, which had become barred by provisions of the Railway Act:—*Held*, that a new cause of action was not set up in the amended statement of claim. *McEwen* v. *North West Coal and Navigation Co.*, 1 Terr. L. R. 203.

See Judgment, I. 1, II. 2—Venue, 3.

IX. Statement of Defence.

1. Contract — *Striking out defence—Falsity.*] — Action on a contract. Defence: "never agreed." The defendant's affidavit disclosed that his defence was that a tender of a contract he had made had never been accepted by the plaintiff:—*Held*, that under the circumstances there was matter for trial, and that the defence should not be struck out. *Moore* v. *Murphy*, 20 Occ. N. 353.

2. Malicious prosecution — *Embarrassment—Ambiguity.*]—In an action for malicious prosecution, the statement of defence denied the material allegations of the statement of claim. It also set up generally that the defendant had reasonable cause for taking against the plaintiff the first proceeding complained of, and that the defendant acted *bona fide* and in the reasonable belief of the truth of the charges laid by him. It alleged that the defendant had reasonable and probable cause for believing that the plaintiff was guilty. Paragraphs setting up certain alleged facts and information given to the defendant tending to cause his belief of the plaintiff's guilt, and, also, that the defendant laid all the information received by him before the magistrate before whom the charges were made, and before counsel, who advised that the proceedings complained of should be taken, were struck out. *Rogers* v. *Clark*, 20 Occ. N. 419.

3. Promissory note—*Fraud—Striking out—Falsity.*] — Upon an application to strike out a paragraph of the statement of defence, setting up fraudulent circumstances in the taking of a promissory note—*Held*, that, though the defence was false, and should not be sustained at the trial, in view of *Books* v. *Battin*, 30 N. S. Reps. 386, and *Holmes* v. *Taylor*, 31 N. S. Reps. 191, the application must be refused, the defendant undertaking to swear to a defence, especially of fraudulent circumstances in the taking of the note. *Hamilton* v. *McIntosh*, 20 Occ. N. 16.

4. Promissory note — *Striking out defence—Falsity.*] — The action was upon a promissory note. The defendants alleged no presentment, no notice of dishonour, and payment. The plaintiff's affidavit verified his claim. Affidavits filed by the defendants stated that the note was paid, but did not go far enough to prove non-presentment and lack of notice of dishonour:—*Held*, that the allegations of want of notice and non-presentment must be stricken out, but, as to payment, there was matter for trial, and this paragraph must stand. *Mackintosh* v. *MacCoy*, 20 Occ. N. 412.

PLEADINGS.

See TRIAL, VI. 1.

PLEAS.

See PLEADING, V.

PLEDGE.

Purchaser of pawn-ticket—*Rights of—Replevin.*]—A writ of replevin can only be directed against the person who possesses the article replevied, or who, having had it in his possession, has parted with it by deceit or fraud, with the object of preventing it from being replevied.—The sale of a pawn-ticket given by a pawn-broker in exchange for an article pawned is a commercial transaction, and one who buys in good faith from the holder, and takes the article out of pawn, cannot be dispossessed even by the true owner, who in this case did not offer to repay the price paid by the purchaser. *Sauvé* v. *Despras*, Q. R. 17 S. C. 453.

See PARTNERSHIP, IV. 1.

POLICE MAGISTRATE.

See CANADA TEMPERANCE ACT, 2, 3—LIQUOR LICENSE ACT — MUNICIPAL CORPORATIONS, I. 1.

POSTPONEMENT OF TRIAL.

See TRIAL, VII.

POWER OF SALE.

See MORTGAGE, II. 3—WILL, III. 3.

PRACTICE.

See ABSCONDING DEBTOR — ACCOUNT—ACTION — ADMINISTRATION—AFFIDAVIT — AMENDMENT — APPEAL—ARREST—ATTACHMENT OF DEBTS—ATTACHMENT OF GOODS — BAIL—BENEFICE D' INVENTAIRE — CERTIORARI—COMPANY, II. 2, IV.—COSTS—COUNTY COURT JUDGE—COURTS—CRIMINAL LAW, VIII.—DAMAGES—DEFAMATION, 2, 3, 4—DISAVOWAL—DISCOVERY — EVIDENCE — EXECUTION—EXECUTORS AND ADMINISTRATORS, 1, 8, 9—FENCES—FRAUDULENT CONVEYANCE, 1, 2, 4, 6—HABEAS CORPUS — HUSBAND AND WIFE, I., III., VIII. 1, 2, 6, 8—INDEMNITY—INFANT — INJUNCTION — INTERPLEADER — INTERVENTION — JUDGMENT — JUDGMENT DEBTOR—JURISDICTION — LANDLORD AND TENANT, X.—LIMITATION OF ACTIONS, 2, 3, 4, 7, 8—LOCAL JUDGES AND MASTERS — LUNATIC — MANDAMUS—MECHANICS' LIENS, III. 2, 3, 5, 6—MINES AND MINERALS, I.—MORTGAGE, II. — MOTION — MUNICIPAL ELECTIONS, I.—OPPOSITION — PARLIAMENTARY ELECTIONS, II.—PARTICULARS—PARTIES—PARTITION, 2—PARTNERSHIP, III.—PAUPER — PAYMENT OF MONEY OUT OF COURT—PEREMPTION — PETITION — PLEADING — PROHIBITION — RECEIVER — REFERENCE—REPLEVIN — RES JUDICATA — REVIVOR — SESSIONS—SET-OFF—SHERIFF—SOLICITOR—STAY OF PROCEEDINGS—TRIAL — TRUSTS AND TRUSTEES, 3—VACATION—VENUE — VOLUNTARY ASSOCIATION — WITNESSES—WRIT OF SUMMONS.

PREFERENCE.

See BANKRUPTCY AND INSOLVENCY, III.

PRESCRIPTION.

See APPEAL, XIV. 3—ASSESSMENT AND TAXES, IV. — LIMITATION OF ACTIONS—SALE OF GOODS, V.

PRESUMPTION.

See BANKRUPTCY AND INSOLVENCY, III. 4—BILLS OF EXCHANGE AND PROMISSORY NOTES, 3—COMPANY, II. 5—EVIDENCE, II. 3—GIFT, 4—HUSBAND AND WIFE, I. 2—JUDGMENT, II. 3—NEGLIGENCE, 2.

PRINCIPAL AND AGENT.

1. Commission of land agent.]—The defendant, knowing that the plaintiff was a land agent, arranged with the plaintiff to procure for him a purchaser for a lot of land of his at a named price. Through the plaintiff's intervention a proposed purchaser was procured, and a purchase discussed; the result, however, was that a lease was entered into of the premises for three years, with a collateral agreement giving him the option of purchasing within a year, which he exercised, and purchased the property:—*Held*, that the plaintiff was entitled to his commission from the defendant. *Morson* v. *Burnside*, 20 Occ. N. 169, 31 O. R. 438.

2. Possession of goods— *"Intrusted" —Estoppel.*]—A limited meaning is to be given to the term "agent" as used in R. S. O. c. 150. It is to be restricted to mercantile agents, and does not include every one who may act and who has possession of the property. An agent within the Act must be one who is *intrusted* with the possession as agent for sale in a mercantile transaction, or for a purpose connected with the sale of the property:—*Held*, that an agent who had obtained possession of certain lumber from the master of a vessel without authority from the owner, was not *intrusted* with the possession, and the owner was entitled to recover the price against the purchaser, although the latter had paid the agent. *Moshier* v. *Keenan*, 20 Occ. N. 529, 31 O. R. 658.

3. Proof of agency — *Indemnity.*]—Whenever persons assume the character of duly authorized agents, they must prove their agency or indemnify third parties against the consequence of its absence. *Letellier* v. *Boivin*, Q. R. 16 S. C. 428.

4. Sale of goods by agent—*Commission—Evidence.*]—The appellants dealt in electrical supplies at Halifax, and had at times sold goods on commission for the respondents, a company manufacturing electrical machinery in Montreal. In 1897 the appellants telegraphed the respondents as follows: "Windsor electric station completely burned. Fully insured. Send us quotations for new plant. Will look after your interest." The reply to this was: "Can furnish Windsor 180 Killowatt Stanley two phase complete exciter and switchboard, $4,900, including commission for you. Transformers, large sizes, 75 cents per light * * *." The manager of the appellants went to Windsor, but could not effect a sale of this machinery. Shortly afterwards a travelling agent of the respondents came to Halifax and saw the manager, and they worked together for a short time trying to make a sale, but the agent finally sold a smaller plant to the Windsor company for $1,800. The appellants claimed a commission on this sale, and on its being refused brought an action therefor:—*Held*, Gwynne, J., dissenting, that the appellants were not employed to effect the sale actually made; that the respondents offered the commission only on the sale of the specific plant mentioned in the answer to the request for quotations; and that there was no evidence of any course of dealing between the two companies which would entitle the appellants to such commission. *Starr, Son, & Co.* v. *Royal Electric Co.*, 20 Occ. N. 323, 30 S. C. R. 384.

5. Sale of shares — *Broker's commission—Sale not carried out—Pleading.*]—A declaration alleging that the plaintiff was authorized to sell, for a commission, certain shares of a mining company; that he found a purchaser therefor, but that the sale did not take place because the defendants imposed new conditions to the purchaser; is sufficient in law to maintain an action for the recovery of the commission which would have been obtained under the said sale, especially where an acknowledgment to owe and a promise to pay are alleged to have been made by the defendants. *Leet* v. *Morris. Leet* v. *Montreal and Oregon Gold Mines (Ltd.)*, 2 Q. P. R. 457.

See ATTACHMENT OF DEBTS, I. 2 — BILLS OF EXCHANGE AND PROMISSORY NOTES, 14 — BROKERS — CONTRACT, IV. 3—INSURANCE, II.—LIMITATION OF ACTIONS, 11, 12 — PARTICULARS, II. 10— PARTNERSHIP — SALE OF GOODS, II.— SOLICITOR, V. 1.

PRINCIPAL AND SURETY.

1. Application of payments—*Mechanic's lien—Declaration of right.*]—The plaintiff, who was a director of a company for which the defendants were doing work, indorsed the company's note in the defendants' favour for part of the defendants' claim. The note was discounted by the defendants, and was dishonoured, and the holders obtained judgment against the plaintiff, who did not, however, pay any part of the claim. Subsequently the defendants obtained, in mechanic's lien proceedings instituted by other creditors, a dividend of eighty-one cents on the dollar of their total claim, including the portion covered by the note:—*Held*, that they were not bound to apply the amount received first in satisfaction of the portion of the claim covered by the note, nor entitled to apply it first in satisfaction of the portion of the claim not covered by the note, but were bound to apply it *pro rata* on the whole claim:—*Held*, also, that the plaintiff was entitled to a declaration of right in this respect, although he had paid nothing on the judgment. *Hood* v. *Coleman Planing Mill and Lumber Co. of Burlington*, 20 Occ. N. 205, 27 A. R. 203.

2. Conditional warranty — *Notice—Possession of goods.*]—T. wrote a letter agreeing to guarantee payment for goods consigned on *del credere* commission to R., on condition that he should be allowed, should occasion arise, to take over the goods consigned. Shortly afterwards the creditor, without giving any notice to T., closed the agency, withdrew some of the goods, and permitted

others to be seized in execution and removed beyond the reach of T. The creditor did not give T. any authority to take possession of the goods as stipulated in the letter of guaranty. In an action by the creditor to recover the amount of the guaranty:—*Held*, that the conditions of the guaranty had not been complied with by the creditor, and that he could not hold the warrantor responsible. *Brown* v. *Torrance*, 20 Occ. N. 270, 30 S. C. R. 311.

See CROWN, IV. 1—JUDGMENT, II. 2—PARTICULARS, II. 6—STAY OF PROCEEDINGS, 6.

PRIORITIES.

See MECHANICS' LIENS, I., III. 4—MORTGAGE, IV. 1—REGISTRY LAWS, I. 1, 2.

PRIVATE WAY.

See WAY.

PRIVILEGE.

See DEFAMATION, 6 — DISCOVERY, IV. 1, 3.

PRIVY COUNCIL — JUDICIAL COMMITTEE.

Appeal — *Right of—From judgment on petition of right.*]—An appeal lies to Her Majesty in Council from a decision of the Court of Queen's Bench (Quebec) on a petition of right. *Regina* v. *Demers*, [1900] A. C. 103.

PRIVY COUNCIL, RAILWAY COMMITTEE OF.

See RAILWAYS AND RAILWAY COMPANIES, XI.

PROBATE COURT.

See FRAUDULENT CONVEYANCE, 2.

PROCEDURE.

See CRIMINAL LAW, VIII.

PRODUCTION OF DOCUMENTS.

See DISCOVERY, I. 1, IV.

PROHIBITION.

I. COUNTY COURTS.
II. DIVISION COURTS.
III. MAGISTRATES.
IV. OTHER TRIBUNALS.

See MUNICIPAL CORPORATIONS, X. 1.

I. COUNTY COURTS.

1. Amount in controversy—*Mining claim—Transfer of action.*]—The plaintiff was a miner in the employment of the defendants, and brought an action in a County Court (mining jurisdiction) for $2,190 damages for personal injuries. The defendants moved for prohibition, on the ground that the amount sued for was beyond the jurisdiction of the County Courts:—*Held*, that the action was properly brought in the County Court, under s. 117, s.-s. 2, of the Mineral Act, R. S. B. C. 1897 c. 135. An order was made transferring the action to the Supreme Court. *Beamish* v. *Whitewater Mines (Limited)*, 20 Occ. N. 290, 7 Brit. Col. L. R. 261.

2. Judgment — *Delivery of—Laches—Discretion.*] — The defendant resided in Ontario, and was sued as administrator. The action was brought in the County Court of Selkirk, and tried on the 27th August, 1898; judgment was reserved and rendered on the 11th January, 1899. The defendant had no property in Manitoba, and nothing was done to enforce the judgment there. On the 25th April an action was brought against the defendant in Ontario, and judgment rendered in favour of the plaintiff on the 17th May. Notice of application for prohibition was given to the plaintiff on the 20th May. By s. 130 of the County Courts Act, R. S. M. c. 33, as amended by 56 V. c. 6, s. 1, the County Court Judge has to announce his decision in a case within 60 days from the hearing:—*Held*, that the defendant had not been prejudiced by the non-compliance with this provision, such provision is a mere matter of procedure; and the delivery of judgment after the prescribed time is an irregularity only; the proper remedy would be to appeal against the judgment. The plaintiff, through her solicitor, was made aware of the judgment as soon as it was delivered: she might have appealed against it, but did not, and delayed for more than four months after judgment was rendered before making the application for prohibition. This was not a case in which the discretion of the Court should be exercised in favour of prohibition. *Doidge* v. *Mimms*, 19 Occ. N. 291, 12 Man. L. R. 618.

II. Division Courts.

1. Judgment—*Setting aside — Fraud.*] — A Judge in an action in a Division Court, apart from the jurisdiction conferred by s. 152 of the Division Courts Act to grant a new trial within the fourteen days thereby prescribed, has not any inherent jurisdiction to set aside a judgment by reason of its having been procured by fraud, and to order a new trial. *In re Nilick* v. *Marks*, 20 Occ. N. 261, 278, 31 O. R. 677.

2. Judgment debtor — *Committal — Means of payment.*] — A County Court Judge has jurisdiction under R. S. O. c. 60, s. 247, as amended by 61 V. c. 15, s. 4, in an action in a Division Court, after the examination of, and an order for payment by, a judgment debtor who is a Government officer, to commit him for default in payment, although he has no other source of income than his official salary. The question for the Judge was one of fact, viz., whether the debtor had means to pay, and his decision could not be reviewed in prohibition. *Semble*, that the order complained of was not so much by way of execution, whether qualified or otherwise, as it was of a punitive character, according to *Stonor* v. *Fowle*, 13 App. Cas. 20. *In re Hyde* v. *Caven*, 19 Occ. N. 359, 31 O. R. 189.

3. Wager—*Amendment.*]—The particulars annexed to a summons issued out of a Division Court were: "To amount of a wager won by the plaintiff, $20." The defendant disputed the jurisdiction. By s. 71 of the Division Courts Act, R. S. O. c. 60, the Division Courts shall not have jurisdiction in (1) actions for any gambling debt. It appeared that a bet of $10 was made by the plaintiff with the defendant on the result of an election, and the defendant, by agreement, became the holder of the plaintiff's stake and his own. The plaintiff claimed both stakes as the result of the election, but the defendant refused to pay. At the trial the plaintiff obtained leave to amend the particulars so as to claim a return of his own $10 as money paid to the defendant for the plaintiff's use. The Judge, after hearing all the evidence, found that there had not been a wager or bet, and gave judgment for the plaintiff for $10:—*Held*, that there was power to amend, and this Court could not interfere by prohibition. *In re Sebert* v. *Hodgson*, 20 Occ. N. 308, 32 O. R. 157.

III. Magistrates.

1. District magistrate — *Adjournment.*]—A district magistrate has, as has every other magistrate, discretionary power to adjourn a case coming before him or to proceed with it, notwithstanding any arrangement made between the parties or their attorneys. Motion for prohibition refused. *Ex p. Daigneault*, 3 Q. P. R. 128.

2. Grounds for prohibition—*Criminal law—Lottery.*] — The Superior Court will not interfere by writ of prohibition, to prevent a magistrate from hearing and adjudging a complaint, in a criminal matter within his jurisdiction. 2. Reasons which merely shew that the petitioner for a writ of prohibition may have a good ground of defence to the charge made against him in the proceedings before the magistrate hearing such charge, are insufficient to justify the issue of a writ of prohibition. 3. Letters patent issued by the Lieutenant-Governor-in-Council cannot legalize the sale of lottery tickets for any purpose other than those specied in Art. 205 (c) of the Criminal Code. *Beaudry* v. *Lafontaine*, Q. R. 17 S. C. 396.

IV. Other Tribunals.

1. Bar council of Province — *Advocate—Discipline — Jurisdiction — Procedure.*]—In pursuance of statutory powers, the Bar of Montreal suspended a practising advocate after holding an inquiry into charges against him, which, however, had been withdrawn by the private prosecutor before the council had considered the matter. It did not appear that witnesses had been examined upon oath, during the inquiry, and no notes in writing of the evidence of witnesses adduced had been taken, the effect of such absence of written notes being that the appellant had been deprived of an opportunity of effectively prosecuting an appeal to the general council of the Bar of the Province of Quebec:—*Held*, affirming the judgment appealed from, Q. R. 8 Q. B. 26, that the local council of the Bar of Montreal had jurisdiction to proceed with the inquiry in the interest of the profession, notwithstanding the withdrawal of the charge by the private prosecutor; that a complaint in any form sufficient to disclose charges against an advocate of improperly carrying on trade and commerce and unduly retaining the money of a client, contrary to the by-laws of the local section of the Bar, is a matter over which the council of the Bar has complete jurisdiction; and further, that a writ of prohibition does not lie to prevent the execution of a sentence of suspension pronounced by the council of a local section of the Bar of the Province of Quebec against a member of that section, where the corporation in the exercise of its disciplinary powers had acted within the jurisdiction given to it by statute; and that

the omission to preserve a complete record of the proceedings upon the inquiry of the council in the matter or to take written notes of the evidence of witnesses adduced constituted mere irregularities in procedure which were insufficient to justify a writ of prohibition. *Honan* v. *The Bar of Montreal*, 19 Occ. N. 377, 30 S. C. R. 1.

2. Board of examiners of association — *Members of board — Statute—Repeal.*]—When any provisions of a statute are repealed and others substituted therefor, the provisions repealed remain in operation until the provisions substituted become executory under the repealing statute (R. S. Q., s. 8). And unless the repealing statute otherwise provides, all acts, proceedings, or things done or begun, and all rights acquired, in virtue of the provisions of any statute afterwards repealed, may be continued, completed, and exercised under such provisions, notwithstanding such repeal, by observing, in so far as applicable, the procedure set forth in the new law (R. S. Q., s. 11). The Act 62 V. (Q.) c. 36, amending the law respecting dentists, did not otherwise provide, and therefore the board of examiners of the association of dentists, as constituted under the repealed statute, did not become dissolved and *functi officio* by reason of the enactment of 62 V. c. 36, s. 1, and 62 V. c. 36 did not repeal existing provisions as to the prosecution of offenders. 2. Even if the board of examiners became *functi officio* by reason of 62 V. c. 36, s. 1, a writ of prohibition addressed either to individuals or to a corporation alleged to no longer possess legal existence, would not be the proper remedy. Moreover, a writ of prohibition only lies against an inferior tribunal and not against the members composing such tribunal. *Versailles* v. *Ibbotson*, Q. R. 17 S. C. 195.

3. Recorder's Court — *Unauthorized suit.*]—Where the collector of provincial revenue disavowed and declared that he had not authorized issue by the clerk of the Recorder's Court of Montreal of a summons to recover a penalty for selling intoxicating drink on a Sunday, there is ground for a prohibition to prevent the Recorder's Court from further proceedings upon the summons. *Boisseau* v. *Wiseman*, 2 Q. P. R. 503.

PROMOTERS.

See COMPANY, V.

PROTHONOTARY.

See APPEAL, X. 2.

PROVINCIAL LEGISLATURES.

See CONSTITUTIONAL LAW.

PUBLIC HEALTH.

See MUNICIPAL CORPORATIONS, IV. 4.

PUBLIC MORALS.

See CRIMINAL LAW, X.

PUBLIC POLICY.

See WILL, III 2.

PUBLIC SCHOOLS.

See SCHOOLS.

PUBLIC WORKS.

See CROWN.

QUEEN'S BENCH, MAN.

See APPEAL, II.

QUEEN'S BENCH, QUEBEC.

See APPEAL, IX.

QUO WARRANTO.

See AFFIDAVIT, 3 — COMPANY, I. 1 — CROWN, IV. 5 — MUNICIPAL CORPORATIONS, VII. 2 — MUNICIPAL ELECTIONS, I. 6, 11—SCHOOLS, 4.

RAILWAYS AND RAILWAY COMPANIES.

I. BONDS.
II. BRIDGES.
III. CARRIAGE OF GOODS.
IV. CROSSINGS.
VI. FENCES—CATTLE.
V. EXPROPRIATION OF LAND.
VII. INJURY TO ADJOINING LAND.
VIII. INJURY TO PASSENGERS.
IX. INJURY TO PERSON CROSSING TRACK.
X. INJURY TO SERVANT.
XI. RAILWAY COMMITTEE OF PRIVY COUNCIL.
XII. TOLLS.

See ASSESSMENT AND TAXES, III. 3, 4, V. 3—CONSTITUTIONAL LAW, 5—DEED—LIQUOR LICENSE ACT, II. 2.

I. BONDS.

Provisional directors — *Consideration—Bonus—Conditions — Amalgamation.*]—A railway company, by the bond of its provisional directors, in consideration of a bonus in aid of the company, agreed to erect and maintain workshops during the operation of the railway. The company, after certain changes of name, amalgamated with other companies, and formed a larger one, which ceased to maintain the workshops. That company subsequently amalgamated with and became part of the defendants' company: —*Held*, that the bond of the provisional directors of the first company was a corporate one binding on its successors, and by consequence on the defendants, who had acquired the road; that the road, though it formed part of a larger railway connection represented by the defendants, was still in operation, and, as the contract was to maintain the workshops during the operation of the railway, it remained a binding engagement; and a reference to ascertain the damages, if any, for breach of the covenant, was directed. *Town of Whitby* v. *Grand Trunk R. W. Co.*, 20 Occ. N. 379, 32 O. R. 99.

II. BRIDGES.

Diversion of stream—*Repair—Municipal corporation.*]—A railway company, desiring to carry their railway across a highway at a point where it was carried by a bridge over a small stream, in pursuance of its statutory powers, diverted the stream to a point some distance away, and built a new bridge over it where it then intersected the highway: —*Held*, that, whatever remedy the municipality might have, if they had sustained damage by reason of the exercise by the railway company of their rights, the latter were under no liability, in the absence of special agreement, to keep the substituted bridge in repair. *Town of Peterborough* v. *Grand Trunk R. W. Co.*, 32 O. R. 154.

III. CARRIAGE OF GOODS.

1. Condition limiting liability for loss.]—The Railway Act of Canada is not applicable to a railway situate in a foreign country, though operated by a company incorporated by or under the authority of the Parliament of Canada. Therefore, where goods shipped from Scotland to be delivered at Portland, Maine, to the Grand Trunk Railway Company, and by that company to be forwarded thence to the plaintiffs at Toronto, were destroyed by fire on the line of that company in New Hampshire, by negligence from which they were protected from liability by the terms of the contract for carriage:—*Held*, that the provisions of s. 246 of 51 V. c. 29 (D.) were not applicable to the defendants' contract; and an action to recover damages for the loss of the goods failed. *Macdonald* v. *Grand Trunk R. W. Co.*, 20 Occ. N. 259, 31 O. R. 663.

2. Delivery to wrong person—*Liability.*]—The plaintiff consigned to the defendants certain goods addressed to the 'I. C. Company' simply. He knew that the company had not yet been incorporated; he also knew that the defendants' practice was never to deliver goods consigned "to order" without the production and indorsement of the shipping bill, but that when not consigned "to order" they did sometimes deliver the goods without the production of the shipping bill. The defendants did deliver the goods to a person carrying on business under the name of the I. C. Company, and at the ostensible office of the company: — *Held*, that the plaintiff was most to blame for such delivery, and that the defendants were not liable by reason of their having delivered the goods without first requiring the production of the shipping bills. There is no law here requiring carriers to take up the shipping bills before the delivery of goods. *Conley* v. *Canadian Pacific R. W. Co.*, 20 Occ. N. 458.

3. Loss — *Value—Freight—Consignee—Right of action — Negligence.*]—The value at the place of destination of goods destroyed in a railway accident, is presumed to include the freight on the goods; and where a railway company is

condemned to pay the value of the goods destroyed, the freight will be deducted from the amount of the value at place of destination.—2. The consignors, though not the owners, have a right of action against the railway company for the value of personal effects and wearing apparel destroyed in a railway accident, when the same are destroyed through the company's negligence, the consignors being responsible as depositaries to the owners for the value of such wearing apparel and effects: C. C., Art. 1808.—3. Where effects salved are allowed by the consignors to remain in the defendant company's possession, and are partly destroyed by rats, the company will not be held liable for such destruction where it is not proved that the loss occurred through the fault or negligence of the defendant. *Rosenbloom* v. *Grand Trunk R. W. Co.*, Q. R. 16 S. C. 360.

4. Termination of transit—*Common carriers—Warehousemen—Conditions — Negligence—Railway Act—Discharge of goods—Judicature Ordinance.*] — The defendant company between the 30th April and the 4th May received goods at Winnipeg from the plaintiffs for carriage. The goods were addressed to the plaintiffs, in some instances, "Prince Albert," in others, "Prince Albert, *via* Qu'Appelle," in others, "Prince Albert, Qu'Appelle," in others, "Duck Lake, Qu'Appelle," in others "C/o George Hanwell, Qu'Appelle." Of the places named, only Qu'Appelle was a station on the company's line. The goods were destroyed by fire about noon, on the 13th May. They had arrived at Qu'Appelle from day to day between the 5th and noon of the 12th May, and were apparently on the same days put in the company's freight sheds. The plaintiff's agent at Qu'Appelle was aware each day of the arrival of the goods:—*Held*, following *Mayer* v. *Grand Trunk R. W. Co.*, 31 C. P. 248, that the company's duties as common carriers had ceased before the fire, and that they were liable, if at all, only as warehousemen. The shipping note was indorsed with conditions to the following effect: 3. That the company should not be liable for damages occasioned by fire. 5. That the company should not be liable for any goods left until called for or to order, and warehoused for the convenience of the owner, etc. 10. That all goods addressed to consignees at a point beyond the places where the company had stations, and respecting which no directions were received at those stations, should be forwarded to their destination by public carrier or otherwise as opportunity offered, without any claim for delay against the company, etc. *Per* Richardson, J.—The goods having reached Qu'Appelle, conditions 3 and 5 applied and protected the company. *Per* Wetmore, J.—The Consolidated Railway Act, 1879, s. 25, s.-s. 4, did not prevent an agreement being made that when the goods should reach the point on the company's railway to which they were to be carried, a certain act or dealing with the goods by the company should constitute a discharge of the goods within the meaning of the statute, and that thereupon the character of the company should be changed from that of common carriers to that of warehousemen, and that conditions 5 and 10 constituted such an agreement. *Per* McGuire, J.—Independently of the conditions, the company were not liable even as warehousemen; the company in this capacity being bound to use only ordinary care, and there was no evidence of negligence. *Per* CURIAM, — That the Consolidated Railway Act, 1879, s. 27, s.-s. 1, applies to an action charging the company with negligence as warehousemen, and therefore, the action, not having been commenced within six months, was barred. *Per* Wetmore and McGuire, JJ.—The Consolidated Railway Act, 1879, s. 25, s.-s. 4, applies only to receiving, transporting, and discharging. It being contended that the jury having found that the company had not performed its contract by delivery of the goods, the Court could not find that the character of the defendant company had been changed from that of common carriers to that of warehousemen, on the ground that the effect would be to draw an inference of fact inconsistent with the finding of the jury, which is not permissible under Judicature Ordinance, 1886, s. 331:—*Per* Wetmore, J.—The section refers to inferences of fact inconsistent with the finding of the jury, when such finding is within the province of the jury. *Walters* v. *Canadian Pacific R. W. Co.*, 1 Terr. L. R. 88.

IV. CROSSINGS.

1. Farm crossings — *Statutes—Railway Act of Canada—Jurisdiction of Provincial Legislatures.*] — An owner whose lands adjoin a railway subject to the Railway Act of Canada, upon one side only, is not entitled to have a crossing over such railway under the provisions of that Act; and the special statutes in respect to the Grand Trunk Railway of Canada do not impose any greater liability in respect to crossings than the Railway Act of Canada. The Provincial Legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of a railway subject to the provisions of the Railway Act of

Canada. *Canadian Pacific R. W. Co.* v. *Corporation of Parish of Notre Dame de Bonsecours*, [1899] A. C. 367, followed. *Therrien* v. *Grand Trunk R. W. Co.*, 20 Occ. N. 431.

2. "Farm purposes" — *Injury to stranger—Duty.*] — The defendants having, in compliance with the requirements of s. 191 of the Railway Act of Canada, 51 V. c. 29, made, and assumed the duty of keeping in repair, a crossing over their railway where it crossed a certain farm, nevertheless allowed it to get into an unsafe and defective condition, whereby a horse of the plaintiff was injured. The plaintiff was at the time using the horse, with the permission of the owner of the farm, in hauling gravel from a part of the farm to the highway, for which purpose it was necessary to cross the railway:—*Held*, without deciding whether the right of user of such a crossing is limited to a user for farm purposes, but assuming it to be so limited, that the hauling of gravel was, under the circumstances, a farm purpose, and that the defendant owed a duty, even apart from s. 289, towards one using the crossing by invitation of the owner. *Plester* v. *Grand Trunk R. W. Co.*, 20 Occ. N. 352, 32 O. R. 55.

See LIMITATION OF ACTIONS, 13.

V. EXPROPRIATION OF LAND.

1. Appointment of arbitrator — *Sale by owner — Purchaser — "Opposite party"—Mortgagee.*] — Land belonged to B., subject to a mortgage to K.; the railway company, desiring to expropriate and having complied with the directions of s. 144 of the Railway Act of Canada, served on these parties the notice and certificate of a sworn surveyor as prescribed by ss. 146. 147; B. gave notice of the name of a person whom she appointed her abitrator, but no notice was given by K. B. then sold the land to H. The land had been brought under the new system, and on the certificate of title that H. received there was indorsed a memorandum of the deposit in the Land Titles Office of the certificate of the Minister of Railways, and the plan and book of reference. The company served H. with notice of an application under s. 150 for the appointment of an arbitrator:—*Held*, that s. 145 must be understood to mean that the deposit of the plan, etc., was to be notice to all parties who might deal with the land described after the date of the deposit. As H. had purchased after the proceedings to acquire the land had been commenced, she was in a position analogous to that of a purchaser during the pendency of a suit:—*Held*, also, that K., being a registered mortgagee of the land, was interested in it and was a party opposed in interest to the railway company; she had not given notice of appointing an arbitrator: and, to insure the attainment of the object of the Act, it would be necessary to read the words "opposite party" in s. 150 distributively, and, as both parties interested as against the railway company had not given notice, the railway company had the right to apply for the appointment of a sole arbitrator. *In re Canadian Pacific R. W. Co. and Batter*, 20 Occ. N. 317.

2. Award—*Nullity—Dominion railway—Provincial statute—Application of—Compensation — Set-off — Increased value.*]—Article 5164, R. S. Q., continues to apply to the expropriation of land by a railway company incorporated by an Act of the Quebec Legislature, notwithstanding that the railway has been declared by Dominion statute to be a work for the general advantage of Canada; therefore, by the terms of this Article, an award may be moved against *pour cause de nullité*.—2. The increase in value which arbitrators are authorized to set off against the inconvenience, loss, or damage resulting from the fact that the company has taken possession or made use of lands, is an immediate and special increase in value resulting to the lands from advantages derived by the performance of work by the company, and not future, and therefore eventual and uncertain, advantages. The arbitrators, accordingly, cannot take into account the general improvement in the condition of the locality where the works are going on, but only the improvement to the particular property affected by the expropriation, placing the portion of that property which is left to the owner in a better condition than it was before relatively to other lands in that locality. *Dickson* v. *La Campagnie de Chemin de Fer de Chateauguay et Nord*, Q. R. 17 S. C. 170.

3. Remedy of owner—*Litigious rights—Registration of title.*] — If a railway company incorporated by a provincial charter refuses to recognize the rights of one who claims compensation for land taken by the company, the legal remedy is an *action petitoire*. — 2. If land has been purchased in good faith and the price paid, unless it is established that at the time of the sale the purchaser knew that an action was pending, it cannot be regarded as the purchase of a litigious right, even if later a judicial contest arises on the subject of the title. —3. By virtue of the Railway Act, R. S. Q., Art. 2128 *et seq.*, the registration of sales and transfers of property by way of expropriation is not necessary.—

Semble, that a railway company is not obliged to register its titles. *Quebec, Montmorency, and Charlevoix R. W. Co.* v. *Gibsone*, Q. R. 9 Q. B. 175.

See CROWN, I. 2.

VI. FENCES—CATTLE.

Culvert—*Duty to fence—Negligence.*]—A watercourse, which flowed through a culvert under a railway track, became dried up in the summer; and, to prevent cattle from passing through it, the railway company had gates placed in the culvert, but neglected to keep them up. The company were duly notified and required to supply gates, but did not do so, and the plaintiff's cattle, which were pasturing in a field on one side of the track, the watercourse being dried up, got through the culvert into a field on the other side of the track and thence on to the railway track, where they were injured:—*Held*, that the railway company were liable for the damages sustained thereby by the plaintiff. *James* v. *Grand Trunk R. W. Co.*, 20 Occ. N. 278, 31 O. R. 672.

VII. INJURY TO ADJOINING LAND.

Fire—*Sparks from engine — Negligence, absence of—Liability.*] — Fire was discovered in two or three places along the defendants' right of way shortly after a train and engine had passed. In spite of efforts to control it, this fire spread and injured the plaintiff's wood lot, and he brought this action for damages. The trial Judge held that the fire was caused either by sparks from the engine or originated in some way from the train—he did not determine which—and that this created a presumption of negligence which the defendants had not rebutted:—*Held*, that the French law, and consequently the law in the Province of Quebec, is that the railway company are responsible, notwithstanding the adoption of every means of precaution known to science. The English authorities are not binding in a case pertaining to civil rights and liabilities: *North Shore R. W. Co.* v. *McWillie*, M. L. R. 5 Q. B. 364, 17 S. C. R. 511. Even in countries where it is generally admitted that the statutory authorization to use engines has taken away the common law liability, and left the railway companies responsible for negligence alone, the rule thus laid down in *Rex* v. *Pease*, 4 B. & Ad. 30, *Vaughan* v. *Taff Valley R. W. Co.*, 5 H. & N. 59, and similar cases, has sometimes been doubted and evaded: see *per* Bramwell, L. J., in *Powell* v. *Fall*, 5 Q. B. D. 597; *Ball* v. *Grand Trunk R. W. Co.*, 16 C. P. 252. *Roy* v. *Canadian Pacific R. W. Co.*, 20 Occ. N. 441, Q. R. 9 Q. B. 551.

See FIRE, 1.

VIII. INJURY TO PASSENGER.

Regular station—*Alighting at—Negligence.*]—Special tickets at reduced rates were issued by the defendant company to persons living along the line, and one was held by W., limited to the use of himself and the members of his family, between Vancouver and Central Park station. The plaintiff, who lived in Vancouver, went to visit W., travelling, as was her custom, on W.'s ticket, although not a member of the family. W. lived beyond Central Park station, and the company gratuitously and for her own convenience carried the plaintiff some four hundred yards farther on, where she was allowed to alight. At this place the ground was not level, and a person living along the line had been permitted for his own convenience to lay down on the right of way a platform, one end of which rested on the ground and the other upon a plank. The plaintiff descended safely to the platform, but in passing from it she fell and was injured, owing, as alleged, to some defect in the condition of the plank supporting it:—*Held*, in an action for damages that the company were not liable. *Burke* v. *British Columbia Electric R. W. Co.*, 7 Brit. Col. L. R. 85.

IX. INJURY TO PERSON CROSSING TRACK.

Shunting cars — *Warning — Proof of negligence—Jury.*]—B., in driving towards his home on a night in September, had to cross a railway track between 9 and 10 o'clock, on a level crossing near a station. Shortly before this a train had arrived from the west which had to be turned for a trip back in the same direction, and also to pick up a passenger car on a siding. After some switching the train was made up, and, just before coming to the level crossing, the engine and tender were uncoupled from the cars to proceed to the round house. B. saw the engine pass, but apparently failed to perceive the cars, and started to cross, when he was struck by the latter and killed. There was no warning of the approach of the cars which struck him. In an action by his widow under Lord Campbell's Act the jury found that the railway company were guilty of negligence, and that a man should have been on the crossing when making the switch to warn the public:—

Held, Gwynne, J., dissenting, that it was properly left to the jury to determine whether or not, under the special circumstances, it was necessary for the company to take greater precautions than they did, and to be much more careful than in ordinary cases where these conditions did not exist; and that the case did not raise the question of the jury's right to determine whether or not a railway company could be compelled to place watchmen upon level highway crossings to warn persons about to cross the line. *Barclay* v. *Lake Erie and Detroit River R. W. Co.*, 20 Occ. N. 293, 30 S. C. R. 360.

See CROWN, II. 1.

X. INJURY TO SERVANT.

Negligence—*Condition of road bed.*]—W., an employee of the defendants, in British Columbia, a part of whose duty it was to couple and uncouple cars, was between two cars on a side track, uncoupling, when the train backed, and in attempting to get out of the way his feet were caught in the long grass and weeds which had accumulated on the road bed, whereby he was struck by the train and seriously injured. In an action to recover damages for such injury:—*Held*, affirming the judgment in 6 Brit. Col. L. R. 561, that permitting the grass and weeds to accumulate on the side track was not such negligence on the part of the company as would render them liable in damages to W. *Wood* v. *Canadian Pacific R. W. Co.*, 20 Occ. N. 30, 30 S. C. R. 110.

See MASTER AND SERVANT, IV. 4.

XI. RAILWAY COMMITTEE OF PRIVY COUNCIL.

1. Order of — *Junction of electric railway with Canadian Pacific Railway — Laying switch on highway — Power to authorize — Expropriation of right of way — Injunction — Enforcement of agreement.*]—The defendants were a company incorporated under statutes of the Province of Ontario, operating an electric railway upon Yonge street between the town of Newmarket and the city of Toronto, with its southern terminus in the northern part of the city, a few yards north of the Canadian Pacific Railway lines. By order of the 23rd November, 1899, the Railway Committee of the Privy Council of Canada, reciting the consent of counsel on behalf of the corporation of the city of Toronto, approved of the defendants connecting their tracks with the tracks of the Canadian Pacific Railway by means of a switch, as shewn on a plan annexed to the order, and on the conditions imposed by the order :—*Held*, that the defendants had not the right, without the authority or consent of the city corporation, to occupy or expropriate or otherwise to force their way over a part of Yonge street within the limits of the city so as to enter the lands of the Canadian Pacific Railway Company and make the proposed junction. The order of the Railway Committee was to be regarded as dealing only with the mode of junction or union, and not as expropriating or professing to expropriate a right of way over the highway. And the consent of counsel for the city corporation, when before the Railway Committee, was to be viewed in the same way. Section 173 of the Railway Act of Canada does not give the Railway Committee power to expropriate land or to deal with the right of property. The protection of the crossing or junction is the object of the committee, which has to approve of the place and mode thereof, and which is not concerned, so far as this section applies, with how the railways arrive at the point of union :—*Held*, also, that the defendants had not, by virtue of any statute or agreement, viewing their road as a mere street railway, the right to expropriate the right of way; and even if their road was a railway within the meaning of the Railway Act, s. 183 was not applicable, for the proposition here was not to carry the tracks "along an existing highway," and they could not avail themselves of s. 187, for the provisions of law applicable to the taking of land by the company had not been complied with. The plaintiffs were therefore entitled, without derogation of the order of the Railway Committee, to an injunction restraining the defendants from effecting the proposed junction by the method shewn on the plan. By an agreement made between the plaintiffs and defendants in 1891, the defendants agreed and undertook that upon receiving at any time twenty-four hours' notice from the plaintiffs' engineer they would cease running their cars by electricity on the portion of Yonge street within the city limits :—*Held*, that, nothing having occurred to operate as a waiver by the plaintiffs of this term of the agreement, and the engineer's notice having been given on the 14th November, 1899, the plaintiffs were entitled to an injunction restraining the defendants from propelling their cars by electricity within the limits of the city. *City of Toronto* v. *Metropolitan R. W. Co.*, 20 Occ. N. 40, 31 O. R. 367.

2. Order of — *Rule of Exchequer Court—Condition—Ex parte order.*] — By s. 29 of the Railway Act, 51 V. c. 17, the Exchequer Court is empowered to

make an order of the Railway Committee of the Privy Council a rule of Court; but where there are proceedings depending in another Court in which the rights of the parties under the order of the Railway Committee may come in question, the Exchequer Court, in granting the rule, may suspend the execution until further direction.—2. The Court refused to make the order of the Railway Committee in this case a rule of Court upon a mere *ex parte* application, and required that all parties interested in the matter should have notice of the same. *In re Metropolitan R. W. Co.*, 20 Occ. N. 274, 6 Ex. C. R. 351.

See CONSTITUTIONAL LAW, 6.

XII. TOLLS.

Governor-General — *Penalty — Passenger.*]—The fact that a railway company have not had their tolls approved by the Governor-General under 51 V. c. 29, s. 227, does not in itself entitle a passenger who has paid such tolls to recover three times the amount under s. 290 of that Act, in the absence of evidence that the fares charged were unreasonable or excessive; nor is such passenger entitled to recover back the amount so paid by him as paid under a mistake of fact, where it is such as in equity and conscience he ought to have paid. *Lees* v. *Ottawa and New York R. W. Co.*, 20 Occ. N. 117, 31 O. R. 567.

RAPE.

See CRIMINAL LAW, V.

RATIFICATION.

See CONTRACT, IV. 3—GIFT, 3—PARTICULARS, II. 6—PARTNERSHIP, IV. 4, 6—SALE OF GOODS, II.

REAL PROPERTY ACT, MANITOBA.

See COMPANY, III. 2 — FRAUDULENT CONVEYANCE, 5—REGISTRY LAWS, II.

REAL PROPERTY ACT, N. W. T.

See REGISTRY LAWS, III. 3.

REASONABLE AND PROBABLE CAUSE.

See MALICIOUS PROCEDURE, 2.

RECEIVER.

1. Equitable execution — *Claim against Crown—Distribution of fund—Creditors' Relief Act — Undertaking.*] — The plaintiff and defendant were partners, and as such had a claim against the Crown for work done, which resulted in the payment of a large sum. Subsequently the partnership made a further claim for interest on the sum paid, which was rejected, and could not have been enforced by a petition of right. The Crown, however, without admitting any liability, offered a sum in satisfaction of the claim for interest, and an appropriation was made by Parliament to enable that to be done, but the appropriation lapsed. A Minister of the Crown afterwards offered to pay the defendant half the amount of the appropriation, and the defendant agreed to accept it. Accordingly a sum was granted by Parliament for this purpose, and by an order-in-council authority was granted to pay it to the defendant:—*Held*, that on the date of the order-in-council there existed a debt due by the Crown to the defendant, arising out of contract, and recoverable by petition of right:—*Held*, also, that this sum could be made available for satisfaction of a judgment recovered by the plaintiff against the defendant. *Willcock* v. *Terrell*, 3 Ex. D. 323, and *Manning* v. *Mullins*, [1898] 2 Ir. R. 34, followed. The fact that the Crown is the debtor does not stand in the way of the Court going as far as it can go, without directing or assuming to direct what shall be done by the Crown, towards making such an asset of a judgment debtor available to satisfy the claim of his judgment creditor. Upon the plaintiff undertaking that the fund, if and when it should come to the hands of the receiver, should be applied as if it had come to the hands of the sheriff under the Creditors' Relief Act, an order was made restraining the defendant from receiving the fund, authorizing the receiver to receive it, and providing that his receipt should be a sufficient discharge to the department or officer making payment. *Stewart* v. *Jones*, 20 Occ. N. 380, 19 P. R. 227. (Reversed, 21 Occ. N. 141.)

2. Equitable execution—*Life policy —Assignment — Security.*]—*Held*, that the plaintiffs were entitled to a receivership order to receive the defendant's interest in a life ten-payments policy, which was fully paid up,—the same having been assigned to the plaintiffs as security for a debt due to them, and the assignment entitling the defendant to receive from time to time the cash surrender value of the bonus additions to the policy, and so having ceased to be exigible in execution under R. S. O. c. 77, s. 18, as a

security for money,—on the principle that the benefit of the defendant's interest in the policy under ordinary process being defeated by a prior title,—that of his assignee,—not extending to the whole interest of the defendant in the property upon which the judgment was proposed to be executed, — the plaintiffs were entitled to the aid of the Court to enable them to reach it. *Canadian Mutual L. & I. Co.* v. *Nisbet*, 20 Occ. N. 117, 31 O. R. 562.

3. Equitable execution—*Mortgage—Right of indemnity.*]—A judgment creditor of a mortgagor cannot obtain a receiving order to enforce payment by a purchaser of the equity who, on purchasing, has agreed to assume and pay the mortgage, though he make the application on behalf of himself and all other creditors of the mortgagor. *Palmer* v. *McKnight*, 31 O. R. 306.

See ACTION, 2 — ATTACHMENT OF DEBTS, I. 9, II. 6—FRAUDULENT CONVEYANCE, 6—SHIP, 8.

RECOGNIZANCE.

See CERTIORARI, 6—CRIMINAL LAW, IX. 3.

RECORD.

See APPEAL, X. 7—CRIMINAL LAW, VIII. 1—EVIDENCE, VII. 2—JUDGMENT, II. 3.

RECORDER'S COURT.

See APPEAL, IX. 2—PROHIBITION, IV. 3.

RECOUNT.

See MUNICIPAL ELECTIONS, 1, 7, 8 — PARLIAMENTARY ELECTIONS, II. 2, III.

REDEMPTION.

See MORTGAGE, I. 1, 2, II.

REFEREE UNDER DRAINAGE LAWS.

See MUNICIPAL CORPORATIONS, VIII.

REFERENCE.

Liquidation — *Accounts — Notice—Reports.*]—A referee appointed to proceed with the liquidation of a community of property, as well as with the liquidation of the estate of the husband, and the ascertainment of the respective rights of his heirs, and the settlement of the accounts between them, must give notice to the parties interested before proceeding, and the omission of such notice is a ground for setting aside his report. *Chenier* v. *McMartin*, Q. R. 16 S. C. 368.

See APPEAL, VI. 7—COSTS, III. 5, 6, 7—LOCAL JUDGES AND MASTERS, 1—MUNICIPAL CORPORATIONS, VI. 2.

REFORMATION.

See CONTRACT, V.

REGISTRY LAWS.

I. BRITISH COLUMBIA.
II. MANITOBA.
III. NORTH-WEST TERRITORIES.
IV. QUEBEC.

See ANNUITY—CROWN, IV. 4—DOWER, 1—EVIDENCE, II. 3—MECHANICS' LIENS—MUNICIPAL CORPORATIONS, VIII. 2—RAILWAYS AND RAILWAY COMPANIES, V. 3—VENDOR AND PURCHASER, 2, 4—WAY, II. 4.

I. BRITISH COLUMBIA.

1. Land Registry Act — *Registered judgment — Mortgage — Priorities.*]—*Held*, that a registered judgment binds only the interest of the debtor existing at the time of registration, and therefore cannot affect a mortgage already given by the debtor, although such mortgage is not registered before the judgment. *Yorkshire Guarantee and Securities Corporation* v. *Edmonds*, 20 Occ. N. 447, 7 Brit. Col. L. R. 348.

2. Land Registry Act—*Registration of tax deed—Certificate of title—Priority over earlier certificate.*]—Section 13 of the British Columbia Land Registry Act, R. S. B. C. c. 111, provides that a person claiming ownership in fee of land may apply for registration thereof, and the Registrar, on being satisfied, after examination of the title deeds, that a *prima facie* case is established, shall register the title in the "Register of Absolute Fees." Section 19, which authorizes the Registrar to issue a certificate of title to the person so register-

ing, contains this provision: "Every certificate of title shall be received as *prima facie* evidence in all Courts of justice in the Province, of the particulars therein set forth." And by s. 23: "The registered owner of an absolute fee shall be deemed to be the *prima facie* owner of the land described or referred to in the register for such an estate of freehold as he may possess" * * *:—*Held*, affirming the judgment in 7 Brit. Col. L. R. 12, that a certificate of title issued on registration of a deed from the assessor of taxes to a purchaser at a tax sale does not of itself oust the prior registered owner of the land described in the register, but the holder must prove that all the statutory provisions to authorize a sale for taxes had been complied with. *Johnson* v. *Kirk*—*Kirk* v. *Kirkland*, 20 Occ. N. 294, 30 S. C. R. 344.

II. MANITOBA.

1. Real Property Act—*Cancellation of certificate of title — Error—Fraud—Tax sale.*] — A certificate of title issued through an error on the part of a district registrar may be ordered to be cancelled pursuant to the provisions of ss. 126 and 127 of the Real Property Act, R. S. M. c. 133, notwithstanding the proviso in s. 128, and that there was no fraud on the part of the holder of the certificate. Under 60 V. c. 21, s. 1, as amended by 61 V. c. 33, ss. 8-10, which prescribe the proceedings for obtaining certificates of title for lands purchased at tax sales, it was error in law for the district registrar to issue the certificate in question within six months from the date of the application, as he did, although he had the consent of the only persons who to his knowledge had any interest in opposing the issue. When the certificate in question was issued, the district registrar was not aware that other parties were interested in the land who should have been served with notice under s. 49 of the Act, and this was error in point of fact sufficient with the error in law to warrant an order for cancellation. *In re Buchanan*, 19 Occ. N. 306, 12 Man. L. R. 612.

2. Real Property Act—*Caveat—Address and description of caveator—Foreign corporation—Seal — Signature.*]—In proceeding by way of caveat and petition under the Real Property Act, if the caveator is an incorporated company, it is sufficient to state the full name of the company without further description, although s. 143 of the Real Property Act, R. S. M. c. 133, says that "every caveat filed with the district registrar shall state the name and addition of the person by whom or on whose behalf the same is filed." *Shears* v. *Jacob*, L. R. 1 C. P. 513, and *Woolf* v. *City Steamboat Co.*, 7 C. B. 103, referred to. The signature to the caveat was the name of the company with "O., H., & N., managers," underneath, without the corporate seal:—*Held*, sufficient. A registered judgment creditor has a right, under the Real Property Act, to claim an estate or interest in the lands bound by the judgment. It is not necessary for the petitioners, although a foreign corporation, to shew that they are authorized to hold real estate in this Province. *North of Scotland Canadian Mortgage Company* v. *Thompson*, 20 Occ. N. 181, 13 Man. L. R. 95.

See FRAUDULENT CONVEYANCE, 5.

III. NORTH-WEST TERRITORIES.

1. Land Titles Act—*Assurance fee—"Incumbrances."*]—Where an application is made to have lands brought under the Land Titles Act of the North-West Territories, and the abstract shews a patent from the Crown and several conveyances, but no incumbrances within the definition of s. 2 (8) of the Act:—*Held*, upon the construction of ss. 40 (2) and 115 and item 3 of the tariff of fees, that the assurance fee provided by s. 115 when the land is incumbered, is not payable. *In re Synod of Diocese of Qu'Appele*, 20 Occ. N. 429.

2. Land Titles Act—*Description—Uncertainty — Exceptions.*] — In 1882 the Hudson's Bay Company conveyed to P. the south-half and north-west quarter of a section of land. In 1897 P. by quit claim conveyed to B. the said land, "saving and reserving nevertheless thereout any lots or blocks that may heretofore have been deeded to others," and a few days later B. conveyed to L. by the same description. An application was made by L. to bring the land, except certain specified lots according to a survey, under the operation of the Land Titles Act. He conceded that the lots excepted had been deeded to others, but there was nothing to shew that P. or B. might not have conveyed other lots. Notice of the application was published, but no adverse claimant appeared:—*Held*, nevertheless, that the application must be refused, for uncertainty as to the title of the applicant. *In re Lillis*, 20 Occ. N. 190.

3. Real Property Act—*Executions—Memorials—Certificate of ownership—Duty of Registrar—Exemption—Dominion Lands Act—Homestead Exemption Act—Exemption Ordinance—Homestead—Legislative powers*

— *Ultra vires.*] — The Territories Real Property Act (R. S. C. c. 51), s. 94, as amended by 51 V. c. 20, s. 16, provides that the sheriff may deliver to the registrar a copy of a writ of execution and a memorandum of the lands intended to be charged; and that the registrar shall thereupon, if the title has been registered or so soon as the title has been registered, enter a memorandum thereof on the register; and that from and after such delivery the same shall operate as a caveat. Section 54 of the same Act provides that, after a title is registered, the applicant shall be granted a certificate of title; and that the registrar shall indorse upon the certificate, and the duplicate, a memorial of every mortgage, incumbrance * * * or other dealing affecting the land. The Dominion Lands Act (R. S. C. c. 54), s. 34, provides that the title to a homestead and its attached pre-emption shall remain in the Crown until the issue of the patent therefor, and shall not be liable to be taken in execution before the issue of the patent. R. O. 1888 c. 45, s. 1, s.-s. 9, exempts from seizure under execution "the homestead of the defendant, provided the same be not more than 160 acres; in case it be more, the surplus may be sold subject to any lien or incumbrance thereon." The sheriff delivered to the registrar a copy of a writ of execution accompanied by a memorandum comprising land for which the execution debtor then had a homestead entry under the Dominion Lands Act, but for which at that time a patent had not yet issued:—*Held*, that, whatever might be the liability of the sheriff by reason of his assuming to charge lands which he could not "take," or which were exempt from seizure under execution, it was the duty of the registrar, when issuing a certificate of title to the execution debtor upon his patent, to indorse upon the certificate a memorial of the execution; although without such memorial the land would under s. 61 of the T. R. P. Act be, by implication, subject to the execution. The term "homestead" in the Dominion Lands Act, the Homestead Exemption Act, and the Exemptions Ordinance, has a different meaning in each case. In the Dominion Lands Act, it means land acquired from the Government by the fulfilment of certain conditions as to residence and improvements; in the Homestead Exemptions Act it means any land specially registered in accordance therewith, whether acquired as a homestead under the Dominion Lands Act or not; in the Exemptions Ordinance it may apply to lands which are neither registered under the Homestead Exemption Act, nor acquired otherwise than as a homestead under the Dominion Lands Act. *Per* McGuire, J.—In the Exemption Ordinance the term "homestead" means the enclosure or ground immediately surrounding the mansion or home-residence of the debtor. The Exemption Ordinance, R. O. 1888 c. 45, s. 9, is *ultra vires* of the Legislative powers of the N.-W. T., inasmuch as it is inconsistent with the Homestead Exemption Act, R. S. C. c. 52. *Re Claxton*, 1 Terr. L. R. 282.

IV. Quebec.

Sheriff's sale — *Mortgage—Discharge—Prescription—Action.*]—A sheriff's sale does not purge a hypothec for the purposes of the registrar's certificate produced in the suit in which such sheriff's sale took place.—2. A Judge on a petition, in that suit, for the radiation of an hypothec, cannot adjudicate upon an alleged prescription of ten years which would involve questions of possession and good faith.—3. The removal from the registrar's certificate of a hypothec which obstructs the distribution of the proceeds of an immovable upon which he is collocated, is a legal interest sufficient to justify a party to bring a suit for the radiation of said hypothec. *Gariépy* v. *Paquet*, Q. R. 16 S. C. 414.

REJOINDER.

See Pleading, VI.

RELEASE.

See Husband and Wife, I. 5—Mortgage, I. 3—Particulars, II. 6—Trusts and Trustees, 4.

RELIGIOUS INSTITUTIONS ACT.

See Church, 1.

RENT.

See Landlord and Tenant.

REPLEVIN.

1. Indemnity — *Bond.*]—Rule 1074, dealing with the question of indemnity of the defendant in replevin proceedings, is the statute 48 V. c. 13, s. 8, imported into the Rules, and does not give an independent cause of action, merely adding another condition to the replevin bond required to be taken by the sheriff. *Harper* v. *Toronto Type Foundry Co.*, 20 Occ. N. 63, 31 O. R. 422.

2. Order for interim possession—*Irreparable injury.*]—Where the ownership of effects is claimed by an action in revendication, and it appears that the effects claimed form part of a complete system of electric lighting, and that irreparable injury would be caused to the system by even the temporary withdrawal of the effects claimed, the Court will not disturb the person in actual possession until the respective rights of the contending parties shall have been regularly examined and finally adjudicated upon. *Palliser* v. *Simpson*, Q. R. 9 Q. B. 308.

See ATTACHMENT OF GOODS, 2 — PLEDGE.

REPLY.

See PLEADING, VII.

REPORT.

See REFERENCE.

RES JUDICATA.

1. Mining law—*Declaration in judgment.*]—When the full Court varied the judgment of the trial Judge dismissing an action to "adverse" a mining claim, by expressly excepting from the judgment "any declaration affecting the title of either party to their respective mineral claims," the parties were, by implication, left in the same position as they stood before the action was brought, and therefore the subject-matter was not *res judicata*. *Dunlop* v. *Haney*, 7 Brit. Col. L. R. 307.

2. Premature action—*Second action—Mortgagee—Purchaser's covenant—Assignment of.*]—A mortgagee had taken an assignment from a mortgagor of the covenant of a purchaser of the equity to pay off the mortgage, and had, on receiving certain securities, agreed with the purchaser not to sue him until certain other remedies were exhausted, and had been unsuccessful in a suit against the mortgagor, on the ground that the remedies were not exhausted: *Barber* v. *McCuaig*, 24 A. R. 492, 17 Occ. N. 280; 29 S. C. R. 126, 19 Occ. N. 52. In a second action on the same covenant:—*Held*, that the Court may properly examine the pleadings, evidence, and proceedings at the trial of the former action, and that the reports of the reasons given for the judgments may be looked at for the purpose of ascertaining what the law is. That the dismissal of an action on the ground that it was prematurely brought, is no bar to another action on the same demand after time has removed the objection. And that the mortgagee, having exhausted her remedies and made an arrangement with the purchaser by which she was placed in the same position with respect to him as she was before she received the securities, was entitled to recover notwithstanding that she had retransferred the securities to him and agreed not to sue on his covenant; but the latter agreement was not to apply to the mortgagor, in case the purchaser's covenant was reassigned to him. *Barber* v. *McCuaig*, 20 Occ. N. 102, 31 O. R. 593.

See CONSTITUTIONAL LAW, 8 — COURTS, V. 2—JUDGMENT, II. 4—PARTNERSHIP, IV. 1.

RESCISSION OF SALE.

See VENDOR AND PURCHASER, 6, 7, 9.

RESERVATION OF RIGHTS.

See LIMITATION OF ACTIONS, 10.

RESOLUTIONS.

See MUNICIPAL CORPORATIONS, XIII.

RESTRAINT OF TRADE.

See CONTRACT, I.—COVENANT.

RESTRAINT ON ALIENATION.

See CROWN, IV. 3.

REVENDICATION.

See REPLEVIN, 2.

REVENUE.

I. CUSTOMS DUTY.
II. SUCCESSION DUTY.

I. CUSTOMS DUTY.

1. Customs Act, s. 192—*Penalties—Jurisdiction of Exchequer Court — Discretion of Judge—Remission of penalty.*]—The

penalty enforceable under the provisions of s. 192 of the Customs Act in the Exchequer Court is a pecuniary one only; the other remedies open to the Crown thereunder cannot be prosecuted in this Court. 2. The Court has no discretion as to the amount of the penalty recoverable under such enactment. 3. If a case is established against any defendant, the whole penalty prescribed by the statute must be enforced. The power of remitting such penalty is vested in the Governor in Council. It is proper for the Crown, if it sees fit, during the pendency of an action for penalties, to agree upon terms of settlement of the action with the defendant; but the judgment asked for in confirmation of the settlement should be for a sum which will vindicate the law and will conserve the public interest. *Regina* v. *Fitzgibbon*, *Regina* v. *Thouret*, 20 Occ. N. 276, 6 Ex. C. R. 383.

2. Customs officer — *Illegal seizure—Notice of action.*]—A seizure or confiscation is irregular and illegal when it is made in a house or other building by a customs officer who has not previously made a declaration on oath before a justice of the peace and who is not legally fortified with a writ of assistance pursuant to the Customs Act.—In such a case he exceeds the limits of his duty and acts outside his office, and therefore has not the right to the one month's notice of action prescribed by Art. 145 of the Customs Act. *Chagnon* v. *Quesnel*, 2 Q. P. R. 509.

See STATUTES, III. 2.

II. SUCCESSION DUTY.

1. Deduction of debts—*Compromise of claim.*]—*Held*, that, for the purpose of arriving at the aggregate value of the property of a deceased person under s. 3, s.-s. 3, of the Succession Duty Act, R. S. O. c. 24, debts are to be deducted. The duty to be paid by the person who takes is on the value of the estate which he takes at the time of taking; and the estate on which the duty is to be paid is the surplus estate after payment of debts:—*Held*, also, that a certain sum *bona fide* paid by executors for the purpose of settling a claim against them as such, must be considered a debt for the purpose of administration and of ascertaining the amount of succession duty. *Ross* v. *The Queen*, 20 Occ. N. 332, 32 O. R. 143.

2. Foreigner — *Bank deposit.*]—The Succession Duty Act, R. S. O. c. 24, contemplates a site or locality being given to all kinds of personal property, and that the domcil of the deceased owner is not to be regarded. A resident of the United States deposited moneys in certain banks in Ontario at interest, and took deposit receipts therefor:—*Held*, on his death in the States, that the moneys were liable to the Ontario succession duties. *Attorney-General for Ontario* v. *Newman*, 20 Occ. N. 70, 31 O. R. 340.

3. Principle of calculation.]—Under s. 4 of the Succession Duty Act, where the aggregate value of the property exceeds $200,000, only the excess over that amount is subject to a duty of $5 for every $100 of the value. *In re Todd—Todd* v. *Todd*, 20 Occ. N. 143, 7 Brit. Col. L. R. 94.

REVERSIONER.

See TRESPASS, II. 2.

REVIVOR.

1. Substituted plaintiff—*Consent—Costs — Transfer pendente lite—Stay.*]—It may in rare cases, such as *Chambers* v. *Kitchen*, 16 P. R. 219, be "necessary or desirable" under Rule 396 to add or substitute a person as plaintiff, without the consent required by Rule 206 (3), upon the application of the opposite party; but where it becomes necessary to substitute a person as plaintiff without his consent, to prevent injustice, he should not be exposed, without some further action on his part or adoption by him of the position into which he is forced, to any liability for damages or costs. Under the circumstances of this case, the fact that F. had become *pendente lite* the transferee of the promissory note sued on did not entitle the defendants to an order substituting him as plaintiff and making him liable for the costs of the action. But the original plaintiff could not be allowed to prosecute the action further, because he had no longer any interest in it, and F. could not be allowed to do so, because he had not caused himself to be substituted as a plaintiff nor obtained leave to proceed in his own name upon the judgment pronounced in favour of the plaintiff, which had not been entered, but from which the defendants sought to appeal; and all further proceedings in the action should, therefore, be stayed, but without costs. *Murray* v. *Wurtele*, 20 Occ. N. 453, 19 P. R. 288.

2. Uncontested petition—*Judgment.*]—If a petition for revivor after the death of the plaintiff is not contested within the time fixed, it is to be con-

sidered admitted: Art. 272, C. P.: and a judgment to that effect is unnecessary. *Jasmin* v. *Sauriol*, 2 Q. P. R. 508.

See COSTS, V. 1 — EXECUTORS AND ADMINISTRATORS, 3, 10—HUSBAND AND WIFE, I. 6—LIMITATION OF ACTIONS, 3, 4—MORTGAGE, II. 2.

REVOCATION.

See TRUSTS AND TRUSTEES, 4—WATER AND WATERCOURSES, I. 1.

RIVERS AND STREAMS.

Driving logs—*Obstructions—Dams.*]—By R. S. O. 1887 c. 120, s. 1, all persons are prohibited from preventing the passage of saw-logs and other timber down a river, creek, or stream by felling trees or placing any other obstruction in or across the same:—*Held*, reversing the judgment of a Divisional Court, 20 O. R. 206, 18 Occ. N. 135, that placing a dam on a river or stream by which the supply of water therein was diminished so as to interfere with the passage of logs was an obstruction under this Act. *Farquharson* v. *Imperial Oil Co.*, 19 Occ. N. 372, 30 S. C. R. 188.

See RAILWAYS AND RAILWAY COMPANIES, II. — WATER AND WATERCOURSES.

ROAD.

See WAY.

ROAD COMPANY.

See CONTRACT, I. 8.

RULE NISI.

See MOTION, 3.

RULES OF COURT.

Amendment—Retroactivity.]—See *Bank of British Columbia* v. *Trapp*, 20 Occ. N. 464.

SALE OF GOODS.

I. AUCTION.
II. AUTHORITY OF AGENT.
III. CONDITIONAL SALE.
IV. FAILURE OF TITLE.
V. PRESCRIPTION.
VI. REFUSAL TO ACCEPT.
VII. STATUTE OF FRAUDS
VIII. TERMS AND CONDITIONS OF SALE.
IX. WARRANTY OF SPECIFIC ARTICLE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4—CONTRACT—COURTS, VI. 5—EXECUTION, IV.—LIMITATION OF ACTIONS, 14 — PARTNERSHIP, IV. 6—PLEADING, I.—PRINCIPAL AND AGENT, 4.

I. AUCTION.

Rights of purchaser — *Payment.*]—The purchaser at a judicial sale of goods by auction does not acquire the property in them until payment of the purchase price, and therefore cannot, in the absence of payment, rely upon the sale as a ground of opposition to a subsequent sale of the goods. *Lamaire* v. *Filiatrault*, Q. R. 16 S. C. 334.

See AUCTION.

II. AUTHORITY OF AGENT.

Ratification.]—In an action for the price of certain articles alleged to have been sold by the plaintiff to the defendants, for use in connection with the construction of their line of railway, it was shewn that the articles sued for were sold to H., who acted as manager for the defendants, and were used by him in connection with the building of the road. It was also shewn that the plaintiff was employed by H. to do certain work on the road, and that this act of H. was recognized and ratified by the company, who paid plaintiff for the services rendered by him:—*Held*, that there was sufficient evidence to support a finding that the sale of the articles sued for was made to the company, and not to H. individually. *McDonald* v. *Broad Cove Coal Co.*, 32 N. S. Reps. 486.

III. CONDITIONAL SALE.

Possession — *Non-payment — Loss of goods.*]—In an action upon a promissory note given by the defendant for the

price of a machine sold by the plaintiffs to the defendant upon a conditional sale, under which the property in the machine was not to pass until payment, it appeared that the machine had been accidentally destroyed by fire while in the defendant's possession before payment in full was made:—*Held*, that a substantial interest in the machine had passed to the purchaser, and he was liable for the price. *Hesselbacher* v. *Ballantyne*, 28 O. R. 182, 17 Occ. N. 17, approved. *Goldie and McCulloch Co.* v. *Harper*, 20 Occ. N. 4, 31 O. R. 284.

See *post*, VI. 2.

See BILLS OF SALE AND CHATTEL MORTGAGES, 5.

IV. FAILURE OF TITLE.

Damages.] — The purchaser of a chattel is entitled to recover from the vendor upon failure of title, the value of the chattel, and not merely the amount paid by him to the vendor. *Confederation Life Association* v. *Labatt*, 20 Occ. N. 299, 27 A. R. 321.

V. PRESCRIPTION.

Action en garantie — *Recovery of price—Damages.*]—The plaintiff in an action in which a right of property in personal estate is claimed, to which a *prescription trentenaire* is pleaded, and who then brings in his vendors *en garantie*, cannot add to his demand *en garantie* a claim for damages and for recovery back of his purchase money, and this part of the action *en garantie* will be dismissed upon *exception à la forme*. *Anderson* v. *Smith*, 3 Q. P. R. 56.

VI. REFUSAL TO ACCEPT.

1. Right of rejection—*Notice.*]—A purchaser of goods ordered to be sent by railway does not lose his right of rejecting the goods by unloading them from the cars on arrival and teaming them to his own premises, if he then finds them inferior to what he had ordered, and so notifies the vendor within a reasonable time. *Taylor* v. *Smith*, [1893] 2 Q. B. 65, followed. *Creighton* v. *Pacific Coast Lumber Co.*, 18 Occ. N. 425, 19 Occ. N. 285, 12 Man. L. R. 546.

2. Tender—*Waiver—Damages—Property not passing—Possession—Judgment — Payment into Court.*]—Agreement for sale of goods for $175, payable $30 on receipt of bill of lading for or tender of the goods, and the balance in instalments, for which promissory notes were to be given; the property to remain in the plaintiff until payment of the notes, but the goods to be shipped as soon as possible. On the 6th June the plaintiff sent the defendant an invoice of the goods. On the 14th June the defendant wrote to the plaintiff refusing to proceed with the contract upon the ground that the invoice price was not that agreed upon. On the 15th June the plaintiff advised the defendant that the goods had been shipped and draft and notes forwarded. Some correspondence ensued, but the defendant adhered to his refusal to take the goods. The goods arrived at the town where the defendant lived on the 10th July, and the defendant on the 20th July again wrote that the plaintiff had concluded not to ship the goods, and again refused to take them:—*Held*, that the defendant having refused to perform his contract on the 15th June, at which date he did not contend that there had been default on the plaintiff's part, and his refusal remaining unretracted down to the time of the arrival of the goods in July, his right to require tender at the date fixed by the performance was waived:—*Held*, also, that the plaintiff was entitled to recover the full price of the goods as damages for breach of the contract—*Held*, further, that the defendant should be allowed to pay the amount of the judgment and costs against him into Court, to be paid out to the plaintiff upon his shewing that the defendant could still obtain possession of the goods. *Tufts* v. *Poness*, 20 Occ. N. 330, 32 O. R. 51.

VII. STATUTE OF FRAUDS.

1. Delivery — *Acceptance—Shipment—Inspection.*]—The defendants agreed to buy from the plaintiff ten thousand bushels of No. 2 red wheat, at $1.12 per bushel, to be delivered f.o.b. a vessel to be provided by the defendants, who were to pay freight and insurance, and delivery was to be made to them on payment of a sight draft for the price. The captain of the vessel gave the plaintiff a bill of lading, describing him as the consignor, and in it, under the heading "consignees," was written "order of Bank of Montreal, advise Melady & McNairn (defendants)." A draft for the price, drawn by the plaintiff upon the defendants, was attached to the bill of lading and discounted, but the defendants refused to accept this draft:—*Held*, that there was, upon these facts, no final appropriation of the wheat or delivery thereof to the defendants, and

that the property therein would not pass to them until acceptance of the draft, or payment or tender of the price: —*Held*, also, that neither the shipment in the vessel provided by the defendants, nor the taking by defendants of samples of the cargo for inspection, constituted an acceptance within the statute. *Scott* v. *Melady*, 20 Occ. N. 205, 27 A. R. 193.

2. Writing — *Possession — Conversion —Title—Pleading.*] — N. purchased from A. certain goods under hiring agreements, by the terms of which the property in the goods purchased was to remain in A. until payment in full of the price agreed upon. N. died intestate without having made payment as agreed, and the goods were verbally sold by his administrator to the plaintiff. There was no note or memorandum in writing made at the time, and no change of possession. At the time of the sale the goods were in the custody of C., with whom they had been left by N. The defendant, as agent of A., made a demand upon C. for the possession of the goods under the hiring agreements, and they were delivered to him :—*Held*, that the plaintiff could not maintain an action for conversion, there having been no note or memorandum in writing or change of possession, or other compliance with the Statute of Frauds. —2. That, on the issue whether the goods were the goods of plaintiff or of A., whose agent defendant was, the defendant could avail himself of the defence that no title passed to the plaintiff, on account of non-compliance with the provisions of the Statute of Frauds, without pleading the statute : — *Held*, also, that if it became necessary for the plaintiff to alter in any way his statement of claim, or new assign, he could only do so by amending his statement of claim and not by way of replication: —*Held*, also, that the cause having been tried with relation to the effect of the Statute of Frauds, as if the pleadings were sufficient, the Court, on appeal, could make any amendment that was necessary :—*Held*, also, that even if the omission on the part of the defendant to plead the statute were material, the plaintiff should not be allowed to take advantage of it, the whole difficulty, if any, having arisen from irregular and improper pleading commenced by him. *Kent* v. *Ellis*, 32 N. S. Reps. 549.

VIII. Terms and Conditions of Sale.

1. Contract—*Inspection of lumber.*]—A contract for the sale of lumber was made wholly by correspondence, and the latter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here" (at Windsor), "by a competent inspector to be agreed upon between buyer and seller, and his inspection to be final:"—*Held*, that it was not essential for the parties to agree upon an inspector before the inspection was begun; and a person chosen by the buyer having inspected the lumber, and before his work was completed the seller having agreed to accept him as inspector, the contract was satisfied and the inspection final and binding on both parties. *Matheson* v. *Thomson*, 20 Occ. N. 293, 30 S. C. R. 357.

2. Contract — *Written order—Parol variation—Evidence.*]—Action by a Montreal firm for price of engine ordered by the defendants—"for which we agree to pay you $350 delivered in Halifax; shipment to be made as soon as possible." The defendants set up that they gave the order to an agent of the defendants, believing that they were dealing with a Toronto company, who had in their possession a crusher of the defendants worth $780, for which they were to get credit on machinery to be ordered. As a matter of fact the Montreal firm and the Toronto company were distinct :—*Held*, by McDonald, C. J., and Ritchie, J., upon the evidence, that the acceptance of the crusher in payment for the engine ordered was a term of the contract between the parties, and evidence of the agreement with the agent was properly received. But per Weatherbe and Meagher, JJ., that the order delivered by the defendants to the agent being on its face a complete agreement, parol evidence was inadmissible to vary its terms either as to the mode of payment or as to the persons with whom it was made. *Wilson* v. *Windsor Foundry Co.*, 33 N. S. Reps. 21.

3. Demand for security—*Breach of contract—Acquiescence.*]—1. Where goods are sold without condition as to security, a demand by the vendor, before shipment, for security (naming a surety selected by himself) that there will be no trouble about the sight draft attached to the bill of lading, is a breach of contract, and gives rise to a right of action by the purchaser for damages caused by the refusal to deliver.—2. The fact that the purchaser offered sureties amply sufficient, but who were not accepted by the vendor, cannot be interpreted as an acquiescence in the condition sought to be imposed by the vendor. *Durocher* v. *McLaren*, Q. R. 16 S. C. 257.

4. Payment — *Condition—Change—Refusal to deliver.*]—Where goods were sold to be delivered at a railway station, and the condition of payment was acceptance by the purchaser of sight draft

accompanied by bill of lading, the purchaser was not justified in asking to be allowed to retain $50, and, if all was correct, to pay the balance later. Such a demand was a material change of the conditions of the contract, and the seller was entitled to refuse delivery. *Clement* v. *Durocher*, Q. R. 16 S. C. 479.

IX. WARRANTY OF SPECIFIC ARTICLE.

1. Implied warranty of title — *Breach—Evidence.*]—The defendant sold to the plaintiff a mare, then, as was assumed in the absence of evidence to the contrary, in the defendant's possession :—*Held*, following *Raphael* v. *Burt*, 1 Cab. & El. 325, and *Brown* v. *Cockburn*, 37 U. C. R. 592, and distinguishing *Morley* v. *Attenborough*, 3 Ex. 500, that the sale being one of a specific article, and there being no evidence that the vendor did not intend to assert ownership, but only to transfer such interest as he might have, there was an implied warranty of title. The defendant having arranged with the plaintiff that a third party should hold the mare pending settlement of the dispute about the title, and having upon inspecting the adverse claimant's alleged title, authorized the custodian to give her up to the claimant :—*Held*, sufficient evidence, by way of admission, on which the trial Judge could reasonably find a breach of the warranty. *Dickie* v. *Dunn*, 1 Terr. L. R. 83.

2. Implied warranty of title — *Knowledge of defect.*]—If, where a specific article is sold, there is knowledge on the purchaser's part of a defect in the vendor's title, there is no implied warranty of title as against such defect. *Dickie* v. *Dunn*, 1 Terr. L. R. 83, distinguished. *Turriff* v. *McHugh*, 1 Terr. L. R. 186.

3. Parol evidence.]—A written contract was entered into for the sale by description of a specific article, namely, a gasoline engine with a pump standard. It was not pretended that the article did not answer the description :—*Held*, that the contract must be taken to cover, as it purported to do, the whole contract between the parties, and parol evidence was not admissible to shew a warranty made prior to the entering into of the contract which was inconsistent with the written warranty, as it would be allowing the admission of parol evidence to control, vary, add to, or subtract from, the written contract; and the statements alleged to have been made by the vendors, and acted on by the purchaser, were not such as to constitute a separate and independent collateral agreement, and admissible as such. *Northey Mfg. Co.* v. *Saunders*, 20 Occ. N. 171, 31 O. R. 475.

4. Remedy — *Return of article.*] — Where in a contract for the sale of a gasoline engine and tank there was a warranty that if the engine would not work well, notice thereof was to be given to the defendants, stating wherein it failed, and giving a reasonable time to get to it and remedy the defect, and, if such defect could not be remedied, the engine was to be returned to the defendants and a new engine given in its place :—*Held*, that the plaintiff's remedy under such warranty was for the return of the engine and its replacement by another engine, and not for damages for breach of warranty. *Henckcliffe* v. *Banrick*, 5 Ex. D. 177, followed. *Hamilton* v. *Northey Mfg. Co.*, 20 Occ. N. 178, 31 O. R. 468.

SALE OF LAND.

See MORTGAGE, II., IV. 1—SHERIFF, 2—TRUSTS AND TRUSTEES, 7 — USUFRUCT—VENDOR AND PURCHASER—WAY, II. 4 — WRIT OF SUMMONS. V. 4.

SALVAGE.

See SHIP, 9.

SAW LOGS DRIVING ACT.

See WATER AND WATERCOURSES, II. 3.

SCALE OF COSTS.

See COSTS, III.

SCHOOLS.

1. Public schools — *Alteration of boundaries — Arbitrators—Appeal—Discretion—Mandamus.*] — The provisions of s.-s. 3 of s. 39 of the Public Schools Act, R. S. O. c. 292, are permissive, not imperative. It is plain from a review of the history of the legislation as to the matter with which that section deals, that the Legislature in 1887 deliberately abandoned the policy of making it obligatory upon the county council to appoint arbitrators, and plainly vested in the county council the discretion of appointing them or not, as it might in the exercise of that discretion deem proper. Order granting a mandamus to the

county council to appoint arbitrators to hear an appeal against a by-law of a township council providing for the alteration of the boundaries of school sections, reversed. *In re Woolliver and County of Kent*, 20 Occ. N. 97, 31 O. R. 606.

2. Public Schools — *Alteration of boundaries—Division of sections—Appeal—Maintenance of school — Refusal—Demand—Particulars.*]—There is no appeal from resolutions of school commissioners changing the boundaries of school sections, if such resolutions have not been read and published according to law, even when they have been partly acted upon.—When a notice of appeal in the matter of a school complains of the refusal of the school commissioners, the appeal will not be dismissed, upon motion, for default in shewing a demand.—But the appellant will, upon motion of the school commissioners for particulars of the demand, be obliged to declare where, when, how, and by whom the school commissioners received a demand to maintain a school in a particular section. *Rozon* v. *St. Lazare School Commissioners*, 3 Q. P. R. 249.

3. Public schools — *Alteration of boundaries—Union school section.*]—There was no proof of the formation of the union school section in question, but it was shewn that for many years a lot in one township had been marked in the assessment roll as in a school section of the adjacent township, to which the taxes received in respect of that lot were paid; that in various reports and returns made by the school inspector the owner of the lot was treated as a ratepayer in respect of the school section of the adjacent township; that his children went to the school established there; and that in the township school map, prepared by the township clerk under the provisions of s.-s. 4 of s. 11 of the Public Schools Act, R. S. O. c. 292, the lot was marked as in the school section of the adjacent township:—*Held*, that the evidence was sufficient to shew that the union school section existed in fact, and that s. 42 of the Act applied to it, so that it must be deemed to have been legally formed. History and object of that legislation discussed. Proper corporate description of the trustees of a union school section pointed out. A municipality in which there is any territory forming part of the union school section in question, is concerned, within the meaning of s. 43 of the Act, in any proceedings for the alteration of the section, and these proceedings must be based upon a petition of five ratepayers of this municipality, though not necessarily of ratepayers in the territory itself. *Nichol School Trustees* v. *Maitland*, 19 Occ. N. 384, 26 A. R. 506.

4. Public schools—*Trustee—Right to office—Residence—Quo warranto — Discretion—Costs.*]—The defendant, a life tenant of a farm in the township of Albion, lived on it from 1888 until 1894, when he rented it to his son, and went to live with his wife and family on a farm owned by his wife in the township of Caledon, where he continued to live until 1898, when the son having given up possession of the Albion farm, he took possession of it, to enable him to work it, sleeping in the house, and occasionally visiting his wife and family and remaining there over night, while the wife occasionally visited him, staying a couple of weeks, when there was cooking or mending to be done:—*Held*, that the defendant's place of residence was where his wife and family lived, and he was therefore not a resident within the township of Albion, so as to qualify him as a trustee for a school section within that township, to which office he had been elected. As, however, the granting of the order for a *quo warranto* was in the discretion of the Court, and the term of the defendant's office would expire before the issue could be tried, the motion was dismissed, but without costs. The relator was not debarred by R. S. O. c. 292, s. 14, s.-s. 8, from making the application. *Regina ex rel. Horan* v. *Evans*, 20 Occ. N. 172, 31 O. R. 448.

See ASSESSMENT AND TAXES, III. 3, 4—JUSTICE OF THE PEACE, 5.

SCIRE FACIAS.

See PATENT FOR INVENTION, 5.

SEAL.

See CONTRACT, I. 8—REGISTRY LAWS, II. 2.

SEARCH WARRANT.

See CANADA TEMPERANCE ACT, 4.

SECURITY FOR COSTS.

See APPEAL, XV.—COSTS, IV. — EVIDENCE, VI. 2, 3.

SEDUCTION.

Right of action—*Illegitimacy of female seduced.*]—Section 1 of the Act respecting the action of seduction, 55 V. c. 43 (Man.), does not apply to the case of the seduction of an illegitimate female. *St. Germain* v. *Charette*, 20 Occ. N. 249, 13 Man. L. R. 63.

See INFANT, II. 1.

SEIZURE.

See EXECUTION, II., III.

SEPARATE ESTATE.

See HUSBAND AND WIFE, VII.

SEPARATION.

See DOWER, 3—HUSBAND AND WIFE, III. 3, VIII.

SERVICE OF PAPERS.

See PARTIES, II. 2, III. 1—PARTITION, 2—SHIP, 8—SOLICITOR, III.—WRIT OF SUMMONS, I.—V.

SERVITUDE.

See MUNICIPAL CORPORATIONS, VIII. 7—WAY, VIII. 1.

SESSIONS.

Appeal—*Order for costs—Distress warrant.*]—On an appeal to the General Sessions of the Peace from a conviction of a police magistrate, the chairman gave judgment, signing the following minute: "Appeal in this case dismissed with costs to be taxed by the clerk of the peace within five days." No formal order was ever drawn up in pursuance of this minute; but the clerk of the peace afterwards taxed the costs, and on his certificate, at a subsequent sittings of the Court of General Sessions, an order was applied for and obtained for the issue of a distress warrant for the amount of such costs:—*Held*, that, under ss. 880 (*e*) and 897 of the Criminal Code, it was necessary for a formal order to be drawn up in pursuance of the above mentioned minute, and that, therefore, there was no warrant or authority for the certificate of the clerk of the peace, or for the order of the Court of General Sessions directing the distress warrant; and the same must be quashed. Appeals from summary convictions and the costs payable in respect thereof are founded upon the statute law, and the provisions of the law regarding them in England and in this country are essentially different. In this country, in view of s. 880 (*e*) and (*f*) of the Criminal Code, the necessary formal order in pursuance of the above minute might be drawn up at a future sittings of the Court of General Sessions, which is a continuing Court, and the costs included therein *nunc pro tunc* if necessary; and the power to grant costs and determine what costs are just and reasonable is not with us, as it is in England, confined to the justices at the same General Sessions at which the appeal is heard. *In re Township of Bothwell and Burnside*, 20 Occ. N. 226, 31 O. R. 695.

See APPEAL, VII.

SET-OFF.

1. Damages — *Liquidated amount—Refusal to discharge mortgages.*]—A claim for damages resulting from the refusal of the plaintiff to cancel the registry of extinguished mortgages upon a property acquired by the defendant is not clear and liquidated, and cannot be pleaded by way of set-off to the plaintiff's claim in an action. *King* v. *Lepitre*, 3 Q. P. R. 216.

2. Promissory notes — *Account for board.*]—There is no right to plead to an action upon a covenant and promissory notes by asking to set off against it an account for board for several years. *Naud* v. *Marcotte*, 3 Q. P. R. 326.

See BANKS AND BANKING, 4, 5—COSTS, III. 4, V.—CROWN, IV. 4—LIMITATION OF ACTIONS, 7—PLEADING, V. 7—RAILWAYS AND RAILWAY COMPANIES, V. 2—TRUSTS AND TRUSTEES, 3.

SETTLEMENT.

Contingent or vested estate — *Children.*]—*Held*, affirming the judgment in 30 O. R. 517, 19 Occ. N. 171, that under the settlement in question the child who died before the period for conveying took a vested interest. *Lavin* v. *Robertson*, 20 Occ. N. 59, 27 A. R. 114.

See HUSBAND AND WIFE, VI., VII. 4.

SEWERS.

See MUNICIPAL CORPORATIONS, XIV.

SHARES AND SHAREHOLDERS.

See COMPANY, I. 1, VI.—SHIP, 8.

SHERIFF.

1. Interpleader—*Writ of possession—Interference with execution—Claim to land—Costs.*]—Upon an attempt to execute a writ of possession under a judgment against G., who was in actual possession, he was served with a notice by B. claiming the land mentioned in the writ, and informing the sheriff that the house standing thereon was locked and that he (B.) had the key. B.'s claim was as mortgagee upon default in payment of interest. *Semble*, that the sheriff's duty, as soon as he received the writ, was to break open the door and give the plaintiff possession. But *held*, that, as the sheriff was not bound to consider the legality of the claim put forward, he was entitled to an interpleader order. Costs of sheriff ordered to be paid in the first instance by the party putting him in motion. *Hall* v. *Bowerman*, 20 Occ. N. 441, 19 P. R. 268.

2. Mandamus—*Sale of lands.*] — A motion by the curator to force the creditor, requiring the issue of an order upon the sheriff to seize and sell the lands of the insolvent, to give him a description of the lands of such insolvent, will be dismissed, the law itself indicating to the sheriff what he ought to do. *Re Castonguay and Savoie*, Q. R. 17 S. C. 175.

See CRIMINAL LAW, VIII. 4—EXECUTION — MORTGAGE, I. 1 — REGISTRY LAWS, IV.

SHIP.

1. Affreightment—*Carriers — Bill of lading—Conditions—Notice.*] — The appellant, on the 12th July, 1897, embarked on the S.S. "Baltimore City," which was owned and controlled by the respondents, certain sheep and cattle, for shipment from the port of Montreal to the port of Manchester, England, under two bills of lading, which were issued and signed by the agents of the company respondent, and were received and accepted by a shipping broker of Montreal, the agent of the appellants. One of the conditions of the bills of lading reads as follows: "That the freight, whether payable by shipper or by consignee, is to be paid, ship lost or not lost, upon the total number of animals embarked, without regard to and irrespective of the number or condition of those landed, and in cash on demand, without deduction or abatement of any kind." The ship was wrecked in the Straits of Belle Isle on 17th July, 1897, and became a total loss. Part of the sheep and cattle were jettisoned, and the remainder were salved and accounted for in general average. The company respondent sued to recover payment of freight for the whole consignment:—*Held*, that a bill of lading is, at first, a written acknowledgment, by the owners of a ship of their agents, of the receipt of certain goods intrusted to them, and of their undertaking to transport and deliver them to the consignee or his assigns; but it becomes a binding contract, if it be accepted by the shipper, or his representative, without any objection, as he is then presumed to have agreed to its terms, and, in the absence of fraud or mistake, he cannot plead that he did not read it and did not know its contents. 2. That the provisions of Arts. 2442 and 2451, C. C., that freight is not due upon goods lost by shipwreck, nor until their carriage has been completely performed, are to be applied only in the absence of an agreement to the contrary. 3. That a clause in a bill of lading, stipulating that the freight is to be paid at all events, "ship lost or not lost," upon the total number of animals embarked, irrespective of the number landed, and in cash on demand, without deduction or abatement of any kind, is a valid and binding condition. *Glengoil Steamship Co.* v. *Pilkington*, 28 S. C. R. 146, followed. *Dean* v. *Furness*, Q. R. 9 Q. B. 81.

2. Bill of lading—*Custom of port.*]—A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons in whose interests it would be to have a knowledge of its existence, and, in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against the custom. *Parsons* v. *Hart*, 20 Occ. N. 372.

3. Charterparty—*Customary despatch—Notice — Lay days — Demurrage.*]—By charterparty the defendant's ship was to proceed to the port of St. John for lumber for Buenos Ayres, to haul once to loading berth as might be required by the charterer, with the privilege to the charterer of moving the vessel afterwards at his own expense. It was provided that the cargo was to be furnished

at the customary despatch; that lay days should commence from the time the vessel was ready to receive the cargo and written notice thereof given to the charterer, and that for each day's detention by the charterer's default he should forfeit $60. On arrival of the vessel the master was notified by the charterer to proceed to the Government railway wharf to load. On the 28th August the master mailed a notice to the charterer that the vessel was then at loading berth and ready to receive cargo on the 29th. At the time notice was sent, the vessel was not at loading berth:—*Held*, that the vessel should have been at loading berth ready to receive cargo at the time notice was sent, and that the notice was insufficient. The words "customary despatch" in the above charter have not a recognized meaning at the port of St. John with reference to the loading of dry lumber for shipment to South American ports. They mean that the vessel shall be loaded at the usual rate or despatch of persons having a cargo ready for loading. Upon the evidence the Court found the rate to be 35M. per weather working day; substantial work, though not amounting to half a day, to count as half a day. *Cushing* v. *McLeod*, 20 Occ. N. 107, 2 N. B. Eq. Reps. 63.

4. Fishing voyage—*Liability for supplies—Owner—Contract.*]—In an action by plaintiff, part owner of a fishing vessel, against defendant, managing owner of the vessel, for supplies furnished and advances made to the captain and crew in connection with a fishing voyage, it appeared that prior to the time of the alleged furnishing of supplies, etc., the vessel was let to the captain on the "quarter lay," viz., on terms that the captain and crew should prosecute the voyage, and should, at the end of the fishing season, or sooner, dispose of the fish caught and render to the owners of the vessel one-quarter of the proceeds, the remaining three-quarters to be the property of and to be divided among the captain and crew:—*Held*, there being no legal liability on the part of defendant, that it was incumbent upon plaintiff to establish a contract against defendant, and there being no evidence, express or implied, of such contract, the action should be dismissed. *Crowell* v. *Smith*, 32 N. S. Reps. 505.

5. "Owner"—*Action against—Expenses of seaman—Evidence—Board of trade—Certificate — Merchant Shipping Act.*]—In an action brought before the police magistrate for the city of St. John to recover hospital fees, board, and cost of conveying from Hong Kong to London a seaman of the ship "Troop," a certificate of the payment of the said expenses by the board of trade, signed by the assistant secretary of the board, was put in evidence. The present ownership of the ship was proved by a copy of the registry certified under the hand of the Registrar-General at London, the ship being registered at Liverpool. The expenses for which the action was brought were incurred in 1891, and the defendants did not become owners of the ship until 1892:—*Held*, that the words "owner for the time being" in s. 213 of the Merchant Shipping Act, 1854, mean the person who is owner when the action is brought, and not him who was owner when the expenses were incurred. —2. That the payment of the expenses, etc., was sufficiently proved by the certificate of the assistant secretary of the board of trade: s. 227.—3. That the certificate of the Registrar-General was insufficient under s. 107 to prove the ownership, there being nothing to shew that he had charge of the original registry. *Ex p. Troop Sailing Ship Co.*, 34 N. B. Reps. 451.

6. Possession fees.] — Where the marshall had been in possession of a ship under warrants issued simultaneously in two cases, he was allowed only one set of fees. *The Rio Lima*, L. R. 4 Ad. & Ec. 157, followed. *Sundback* v. *The "Saga,"* 6 Ex. C. R. 305.

7. Seaman's wages — *Stipendiary magistrate — Jurisdiction — Complaint.*]—A seaman sued the master of a vessel for wages in the Court of a stipendiary magistrate. The magistrate made an order that the master should pay the sum of $42.20 for wages, besides costs. The magistrate's order having been brought up on *certiorari*, a motion was made to quash it, on the ground that the complaint made before the magistrate did not shew that the vessel was registered in any Province of Canada. It was proved at the trial before the magistrate that the vessel was registered at the port of Dorchester, in the county of Westmoreland and Province of New Brunswick:—*Held*, that the subsequent evidence did not cure the defect in the complaint, and the rule to quash must be made absolute. *In re Gamble* v. *Ward*, 20 Occ. N. 462.

8. Shares in ship—*Receiver—Writ of summons — Service out of jurisdiction.*]—Action by execution creditors against a mortgagee of a British ship to recover the surplus of sale proceeds under power of sale:—*Held*, that the creditors not having got a receiver appointed of the shares, they had passed to the purchaser. 2. That an order for service out of the jurisdiction on the mortgagee could not be made. *Wilson* v. *Donald*, 7 Brit. Col. L. R. 33.

9. Towage — *Salvage — Sufficiency of tender — Costs.*]—A steam-tug was prosecuting her voyage in the lower St. Lawrence, when a slight accident happened to her boiler, in consequence of which her fires had to be extinguished in order that the boiler might cool to allow the engineer to make the necessary repairs. At that time the vessel was in the ordinary channel of navigation, and the weather was fine and the sea calm. The accident happened at 8 p. m. Three hours afterwards, and before repairs could be made, a steamship F., of heavier burthen, approached the tug, and, at the request of her captain, took the tug in tow. The towage covered a distance of 230 miles, and continued for a period of thirty hours, during which neither ship was in a position of danger, nor were the crew of the F. at any time in peril by reason of the services rendered to the disabled tug:—*Held*, that, as the services to the disabled tug were rendered under the easiest conditions, without increase of labour or delay to the F., it was clearly a towage and not a salvage service. 2. It not being a case of salvage, the officers and crew of the F. were not entitled to participate in the amount awarded for the towage, but it belonged to the owners of the ship. 3. The defendants having paid into Court an amount sufficient to compensate the plaintiff liberally for the services rendered, they were given their proper costs against the plaintiff. *Hine* v. *The "Thomas J. Scully,"* 20 Occ. N. 54, 6 Ex. C. R. 318.

See INSURANCE, VII.—STATUTES, IV.

SIDEWALK.

See WAY.

SLANDER.

See DEFAMATION.

SMALL DEBTS COURTS.

See COURTS.

SMALL DEBTS PROCEDURE, N. W. T.

See WRIT OF SUMMONS, VI.

SOLICITOR.

I. CHANGING SOLICITORS.

II. PARTNERSHIP.

III. REPRESENTATION OF CONFLICTING INTERESTS.

IV. RIGHT TO PRACTISE.

V. TAXATION OF COSTS.

See DISAVOWAL — JUDGMENT, V. 1—LUNATIC, 4—MANDAMUS, 1—MORTGAGE, III.—STATUTES, V. 3—WRIT OF SUMMONS, II. 2.

I. CHANGING SOLICITORS.

Informality — *Exception.*]—An *exception à la forme* signed by an attorney other than the one who has appeared, without disavowal or substitution, will be dismissed as irregular. *Moreau* v. *Lamarche*, 3 Q. P. R. 121.

II. PARTNERSHIP.

1. Change in firm—*Service of demand — Peremption.*] — Where a party, plaintiff or defendant, is represented by a firm of attorneys, one of whom is appointed to a judicial position incompatible with the exercise of the profession of an advocate, a peremption of the suit may, nevertheless, be demanded against such party by serving the demand upon those of his attorneys who are still practising. *Bremner* v. *Hibbard*, 3 Q. P. R. 89.

2. Death of partner—*Signature of firm—Peremption.*]—Although the surviving members of a firm of solicitors dissolved by the death of one of its members have a right to make and sign a motion for peremption of the suit, they cannot add to their signatures that of the deceased partner, and if they do it will amount to an absolute nullity. Judgment in 3 Q. P. R. 161, reversed. *Wright* v. *Canadian Pacific R. W. Co.*, 20 Occ. N. 442, 3 Q. P. R. 316.

III. REPRESENTATION OF CONFLICTING INTERESTS.

Intervention—*Withdrawal—Service — Filing.*]—An attorney who has agreed to make an intervention on behalf of a person who has interests opposed to those of the defendant whom he represents, may and ought to cease to represent him.—2. The fact that the intervention is regarded as dismissed because it has not been served, as provided by

Art. 223, C. P., does not alter the attorney's position, if the record shews that he has accepted instructions to make the intervention, and that it is opposed to the claims of the defendant.—*Semble*, that, in spite of Rule of Practice 43, an attorney *ad litem* may renounce his instructions without the permission of a Judge, such Rule being incompatible with Art. 260, C. P., and Arts. 1732 and 1759, C. C., and consequently illegal and void.—*Semble*, also, that the intervention should be served on all the parties to the cause and filed at the record office within the three days following its reception by the Judge. *Hillock* v. *Croizard*, 3 Q. P. R. 225.

IV. Right to Practise.

1. "Practising"—*Law Society—Annual fees.*]—Having regard to the provisions of the Law Society Act, R. S. O. c. 172, and the Solicitors Act, R. S. O. c. 174, the taking out of the annual certificate entitling a solicitor to practise is voluntary and not compulsory, and practising without it only subjects the solicitor to the penalties and consequences imposed by statute; if he practises without taking out the certificate, he does not make himself liable for payment of the fees for such certificate. *Law Society of Upper Canada* v. *Clarke*, 20 Occ. N. 245.

2. "Practising" — *Law Society—Annual fees.*]—A solicitor who has not obtained his annual certificate from the Law Society cannot, without rendering himself liable to suspension, etc., under the provisions of ss. 22, 23, and 24 of R. S. O. c. 174, practise as such, even in an isolated instance, and he is not relieved by the fact that he is interested in the subject-matter of the litigation. *In re Clarke*, 32 O. R. 237.

See *ante*, II.

V. Taxation of Costs.

1. Agent — *Principal solicitor* — *Payment.*]—A solicitor rendered his bill to a company for $769.59, of which there was $414.25 charged as fees, and $355.34 as disbursements. H. had been employed by the company through the company's Toronto solicitors. As to the Toronto solicitors, he seemed to have understood that he was acting on agency terms, and that he was to remit them one-half of his fees. Pursuant to that understanding, on rendering his bill of costs he sent to the Toronto solicitors $207.15, half of $414.25, charged as fees, leaving a balance of $562.44, which he claimed from the company, with, however, an intimation to the solicitors that, as between the company and himself, the bill was rendered for $769.59, though he only claimed $562.44. The bill was taken before the taxing Master, as a whole, for $769.59; he taxed off $221.40, leaving a balance of $548.19. On the ground that more than one-sixth of the whole bill was taxed off, the Master allowed the costs of the reference to the company and taxed the costs to the company against the solicitor:—*Held*, reversing the decision in 19 Occ. N. 290, that there was not sufficient evidence that the Toronto solicitors were authorized to bind the company by the receipt of any of the money. Their position as general solicitors of the company involved no such authority of itself. A portion of the cheque was paid to the Toronto solicitors for their own use. The intention was to allow them half the fees charged by the Winnipeg solicitor, and that was what was paid by that portion of the cheque. It might be that the Toronto solicitors were not entitled, as between themselves and the company, to derive a profit from the transaction, or that such an allowance to them was a breach of the Law Society Act, but since the Winnipeg solicitor chose to make them the payment for themselves, he could not subsequently insist that it was received by them for the company. *In re H., a Solicitor*, 20 Occ. N. 140.

2. Payment—*Connected charges—Agreement—Unsigned bills—Delay—Overcharges.*]—A firm of solicitors for about eight years acted for an estate in the collection of moneys and realization of securities relating to a block of land sold by the testator. During this period the solicitors from time to time rendered statements of account to the executors and paid them cheques for balances in their hands as shewn by such statements, and also rendered detailed bills of their costs for their services, in respect of different actions and proceedings taken, though not in all cases, such bills being paid by the retention by the solicitors, without objection on the part of the executors, of part of the money collected. Two or three of the larger bills were moderated by a taxing officer shortly after they were rendered. Upon an application by the executors for taxation of all the bills after the eight years:—*Held*, that this could not be regarded on one continuous dealing, keeping the right to tax in suspense till the collection or exhaustion of all the securities:—*Held*, also, upon the evidence, that there was no agreement between the solicitors that the right to tax generally should remain open to the executors. As to certain of the bills of costs

said not to have been actually signed by the solicitors :—*Held*, that they were substantially sufficient, and, after being paid out of the funds collected, with the knowledge and sanction of the executors, they could not be treated as open to taxation after years of delay, and no specific overcharges being indicated. *In re Solicitors*, 20 Occ. N. 438, 19 P. R. 271.

See APPEAL, VI. 7.

SPECIFIC PERFORMANCE.

1. Lands abroad — *Jurisdiction.*] — The plaintiff, a resident of Buffalo, agreed in writing with the defendant to exchange certain lands situate in Buffalo for land of the defendant situate in Ontario; and now brought this action for a specific performance of this contract : —*Held*, that the plaintiff having brought his action in this Court, and thereby submitted to its jurisdiction, the Court had jurisdiction to decree specific performance. *Montgomery* v. *Ruppersburg*, 20 Occ. 13, 31 O. R. 433.

2. Vendor and purchaser — *Landlord and tenant—Rescinding agreement of sale—Waiver—Laches.*]—The plaintiff became tenant of a farm under a lease from C. for seven years at an annual rental of $450, payable on the 15th October in each year. Contemporaneously with the lease an agreement of purchase of the property was entered into between the plaintiff and C., by which the latter agreed to accept as part payment of the purchase money all sums of money which should be paid by the plaintiff as rent under the lease, and the plaintiff covenanted, at the expiration of eight years from the date of the instrument, to pay the balance of the purchase money with interest. There was also the covenant of C. to convey upon payment, an option to the plaintiff to pay off the full amount and receive a conveyance at any time, and finally the following proviso : "It is expressly understood and agreed that time is to be considered the essence of this agreement, and unless the payments are punctually made the said party of the first part shall at his option declare this agreement null and void, all payments made thereunder shall be forfeited, and the said party of the first part shall be at liberty to resell the said land, the said party of the second part hereby agreeing to convey to the said party of the first part his interest in the same when and as soon as such default occurs." The lease contained a proviso for re-entry, in the statutory short form, for non-payment of rent. C. afterwards conveyed the land in fee to the defendant Palmatier subject to the lease and agreement. Default having occurred in payment of the rent due on 15th October, 1897, the defendant Palmatier leased the property to the defendant Mills with an option of purchase before the end of the first year of the term, and Mills at once entered into possession :—*Held*, that the lease and agreement between C. and the plaintiff should not be considered as independent contracts, and that C. or his assignee might rescind the agreement of sale for default in payment of any rent called for by the lease.—2. That a formal notice or declaration of rescission of the contract was not necessary, as the plaintiff was aware of the lease to Mills, his taking possession under it, and of Palmatier's intention to rescind. — 3. The plaintiff, having made default as regards an essential term of the agreement, was not entitled to the exercise of the discretion of this Court to order specific performance in his favour after the position of the parties had been entirely changed :—*Held*, also, per Richards, J., that the laches of the plaintiff barred her from the remedy of specific performance against the defendant Mills, who had made valuable improvements without notice that the plaintiff intended to claim specific performance. *Moir* v. *Palmatier*, 19 Occ. N. 287, 20 Occ. N. 89, 13 Man. L. R. 34.

SPEEDY TRIAL.

See TRIAL, VIII.

STATED CASE.

See APPEAL, V. 1.

STATEMENT OF CLAIM.

See PLEADING, VIII.

STATEMENT OF DEFENCE.

See PLEADING, IX.

STATUTE OF FRAUDS.

See CROWN, III. 2—SALE OF GOODS, VII.

STATUTES.

I. Contradictory Texts.
II. Imperative or Directory.
III. Penal Acts.
IV. Repugnancy.
V. Retroactivity.

See Company, III. 2—Constitutional Law—Copyright—Liquor License Act, II. 2—Mechanics' Liens, III. 6—Medical Practitioner, 1—Municipal Elections, I. 2—Prohibition, IV. 2—Railways and Railway Companies, V. 2 — Vendor and Purchaser, 4—Way, II. 1.

I. Contradictory Texts.

English and French texts.]—The charter of the town of Lévis, in its French version, enacts that the qualification of councillors shall be $1,000; in its English version $5,000 is the sum mentioned. Both texts are clear and precise. The section of the general Act respecting town corporations which fixed the qualification for councillors was by a special enactment declared not to apply to the town of Lévis :—*Held*, that the two texts, being contradictory, were mutually destructive, and therefore no property qualification was necessary. *Lacerte* v. *Verrault*, Q. R. 16 S. C. 230.

See Limitation of Actions, 7.

II. Imperative or Directory.

1. Performance of public duty.]—The respondents were municipal councillors of Verdun, where the petitioners owned property. On the 23rd August the secretary of the council gave notice that, in accordance with Art. 746 A of the Municipal Code, a session would be held on the 4th September for the purpose of revising the valuation roll. On the latter day an adjournment was made for two weeks. The petitioners obtained an interlocutory injunction restraining the respondents from proceeding with the proposed revision :—*Held*, that the words of Art. 746 A did not make it imperative that the revision should take place in June or July : Endlich on Construction of Statutes, s. 295 :—*Held*, further, that, even if the words were imperative, the Court had power to compel the performance of a public duty by public officers, though the statutory time for performing the duty had passed : *Dechene* v. *Fairbairn*, 2 M. L. R. 442. Injunction dissolved and petition dismissed with costs. *Canadian Pacific R. W. Co.* v. *Allan*, 20 Occ. N. 444.

2. Transfer of cause—*Jury trial—Security for costs.*]—Upon a motion under the Nova Scotia Act of 1899 c. 39 to transfer an action upon a promissory note from a County Court to the Supreme Court for the purpose of a jury trial, where the only question to be tried was whether a proper tender was made before action, involving only a question of costs, and the transfer would cause delay in trial : — *Held*, nevertheless, that the defendant having made the affidavit required by the statute, there was no discretion to refuse the order, the statute being in its terms imperative; but as a term of the order the defendant was required to deposit in Court $80 as security for costs. *Forsyth* v. *Shipley*, 20 Occ. N. 415

See Assessment and Taxes, II. 2—Canada Temperance Act, 5—Municipal Corporations, IV. 6 — Parliamentary Elections, III. 1.

III. Penal Acts.

1. Abolition of penalty pendente lite — *Second offence—Pleading.*]—Action to recover a penalty for a breach of the Pharmacy Act of Quebec:—*Held*, the a statute, passed after the action had been begun, permitting the sale of medicines prohibited by the original statute, prevents the imposition of a penalty which no longer exists.—2. To establish a second offence, it is not sufficient that two breaches have been successively committed; it is necessary that the first shall have been followed by the infliction of a penalty, and that after that a new breach shall have taken place, and that the infliction of the first penalty shall be alleged in the action to recover the second. Judgment in Q. R. 16 S. C. 536 affirmed. *L'Association Pharmaceutique de Québec* v. *Livernois*, Q. R. 9 Q. B. 243.

2. Construction—*Customs Act — Non-payment of duty.*]—The rule that a penal statute shall be construed strictly does not imply that the narrowest meaning of which they are susceptible, must be given to its words. The rule of interpretation and construction really is, that such statutes are to be taken as not including anything which is not within their letter and spirit, which is not comprised in their words, and which is manifestly not intended by the legislature. Applying this principle to s. 197 of the Customs Amendment Act of 1888, the punishment imposed by the section applies not only to the case where the goods are not found in the possession and keeping of the offender, but also to the case where they are so found: it

being apparent that the object of substituted s. 197 was, to make the person liable to punishment who illegally imported goods without paying the duties lawfully payable, whether the goods were found or were not found in his possession of keeping. *O'Grady* v. *Wiseman*, Q. R. 9 Q. B. 169.

IV. REPUGNANCY.

Colonial Acts—*Imperial Acts—Ship—Deserters from—Conviction.*] — Under the provisions of the Colonial Laws Validity Act 28 & 29 V. c. 63 (Imp.) any colonial law repugnant to the provisions of an Imperial statute having force in Canada is inoperative to the extent only of such repugnancy, and not otherwise. The only repugnancy between s. 104 of the Seamen's Act, Canada, R. S. C. c. 74, and s. 236 of the Imperial Merchant Shipping Act, 1894, is where the ship from which the desertion takes place is a British ship. Hence, cases which relate to deserters from ships which are not alleged and proved to have been registered as British ships, alone fall under the operation of the Canadian Act.—2. A case of harbouring seamen deserting from a ship not alleged and proved to be a British ship, and which at the time of the alleged desertion was lying in the port of Montreal, was rightly brought under the Seamen's Act, Canada. *O'Dea* v. *The Queen*, Q. R. 9 Q. B. 158.

See APPEAL, XIII. 1.

V. RETROACTIVITY.

1. Bankruptcy and insolvency—*Examination of insolvent — Fraud before statute.*]—The provisions of s. 36 of R. S. O. c. 147 for the punishment of an insolvent assignor who has concealed or made away with his property in order to defeat or defraud his creditors do not apply to his acts disclosed on examination as having been done before the date of the passing of the original Act 58 V. c. 23. *In re Lucas, Tanner, & Co.*, 20 Occ. N. 276, 32 O. R. 1.

2. Procedure — *Peremption.*]—A suit begun under the old Code of Procedure can be *perempted* where no useful proceeding has been taken during two years since the coming into force of the new Code; Art. 279 can be invoked in such a case without giving it a retroactive effect. *Couture* v. *Duclos*, 2 Q. P. R. 433.

3. Solicitor—*Action for costs—Delivery of bill.*]—By the Acts of 1899 c. 27, s. 69, to amend and consolidate the Acts relating to barristers and solicitors, passed 30th March, 1899, it was enacted that "no action shall be brought for the recovery of fees, costs, charges, etc., by a barrister or solicitor, as such, until one month after the bill therefor, signed by such barrister or solicitor, has been delivered to the party to be charged," etc. By s. 81 it was provided that the Act should not come into force until the 1st July, 1899. On 4th May, 1899, plaintiffs caused a writ to be issued for the recovery of an amount claimed to be due them from defendants for professional services, and for moneys expended by plaintiffs as solicitors of defendants, upon their retainer and at their request. The statute was pleaded, and it was admitted on the part of the plaintiffs that no bill had been delivered as therein provided:—*Held*, that the delivery of a signed bill, in accordance with the provisions of s. 69, and proof thereof upon the trial, involved a matter of procedure only, or, at most, a mere alteration in the matter of proof necessary to sustain the action, and, therefore, was within the rule stated by Blackburn, J., in *Gardner* v. *Lucas*, 3 App. Cas. 603, that alterations in the form of procedure are always retrospective unless there is some good reason or other why they should not be:—*Held*, also, that the enactment, being a remedial one, should receive a liberal construction. *Harrington* v. *Peters*, 32 N. S. Reps. 464.

See RULES OF COURT.

STAY OF PROCEEDINGS.

1. Costs of former proceeding unpaid — *Identity — Discontinuance.*]—Article 278, C. P., does not require payment of costs as a condition precedent to the institution of a new proceeding except where the first proceeding upon which the party owes costs is identical with that which he proposes to take, and where he has discontinued the first proceeding. And therefore a motion to stay proceedings, where the plaintiff, after his petition for leave to proceed *in formâ pauperis* had been dismissed with costs, was proceeding in the ordinary way, without having paid the costs of the petition, was dismissed. *Christin* v. *Christin*, 3 Q. P. R. 203.

2. Ejectment — *Action en bornage — Consolidation.*] — The defendant in an action *en bornage* cannot answer by a dilatory exception asking that the action be stayed until judgment in an action of ejectment brought by him against the plaintiff. The two actions should not be consolidated. *Mahoney* v. *Mahoney*, 2 Q. P. R. 395.

3. Exception a la forme—*Notice—Default—Costs.*]—A motion in the nature of an *exception à la forme*, accompanied by a certificate of deposit, but without notice of a day for its presentation, has not the effect of stopping the running of the time for pleading; and the plaintiff has a right to his costs upon default of pleading and setting the cause down *ex parte* in the interval. *Lainé* v. *Powell*, 3 Q. P. R. 135.

4. Judgment — *Disavowal—Delay.*]—Where an order for a stay has suspended the execution of a judgment until the party against whom the judgment is, who has disavowed his attorneys, has obtained an adjudication upon his disavowal, a motion of the other party to force the disavowing party to proceed at once upon his disavowal, made twenty-three days after the order for the stay, will be granted. *Sylvestre* v. *Struthers*, 2 Q. P. R. 512.

5. Prior action pending—*Parties.*]—In this action the plaintiffs sought to recover from the defendants a large sum of money, being the portion assessed upon the defendants of the cost of certain drainage works constructed and paid for by the plaintiffs. In a previous action against the same defendants, the plaintiffs therein, who were landowners in the defendants' township and assessed for a portion of the sum now sued for, sought a declaration that the defendants' by-laws purporting to impose this assessment upon the plaintiffs therein, and all the proceedings upon which they were founded, were void, and an injunction to restrain any proceedings for the collection of the amount for which the plaintiffs therein were assessed. In that action judgment had been given in the defendants' favour, but the plaintiffs had an appeal to the Supreme Court of Canada pending when the present action was brought :—*Held*, that the present action should not be stayed until after the determination of the appeal in the other. *Township of Tilbury West* v. *Township of Romney*, 20 Occ. N. 378, 19 P. R. 242.

6. Surety—*Appeal by principal debtor—Garnishment.*]—A surety, against whom suit has been brought, after the plaintiffs have obtained judgment against the principal debtor, from which the latter is appealing, and after attachment of the amount recovered by a creditor of the plaintiffs, is entitled, upon a dilatory exception, to have the proceedings stayed while the appeal and the garnishment proceedings are pending. *Goulet* v. *Fenlin*, 2 Q. P. R. 572.

See APPEAL, XV. 3—EXECUTION, III., 19. 20. 23—EXECUTORS AND ADMINISTRATORS, 1—REVIVOR, 1.

STAY OF TRIAL.

See TRIAL, IX.

STIFLING PROSECUTION.

See CHOSE IN ACTION, 2.

STIPENDIARY MAGISTRATE.

See APPEAL, II. 2 — CRIMINAL LAW, VIII. 1—SHIP, 7.

STREAMS.

See RIVERS AND STREAMS—WATER AND WATERCOURSES.

STREET.

See WAY.

STREET RAILWAYS.

I. CONTRACT WITH MUNICIPALITY.
II. NEGLIGENCE.

See ASSESSMENT AND TAXES, V. 4—RAILWAYS AND RAILWAY COMPANIES, XI. 1.

I. CONTRACT WITH MUNICIPALITY.

1. Extension of limits—*Operation of cars—Action—Ratepayer.*]—The promoters of a street railway company entered into an agreement with a city corporation in 1888, and agreed to run cars along Douglas street to the northern boundary of the city limits. They became incorporated as a joint stock company, and in 1890 obtained a charter authorizing the construction of tramways connecting the country districts with the city system, and in pursuance of the new powers continued the Douglas street tramway northerly along the Saanich road. Traffic on this extension was discontinued in 1898, because it did not pay. In 1892 the city limits were extended so as to include a portion of the Saanich road on which the tramway had been built. In 1894 the company obtained a private Act for the consolidation and confirmation of their rights, powers, and privileges, and ratifying the agreement of 1888 between the city and the original promoters :—*Held*, in an action for a declaration that the company were bound to operate their tram system along Douglas street to the

extended city limits, that the company were not bound to do so. *Quære*, whether a ratepayer could sue. *Yates* v. *British Columbia Electric R. W. Co.*, 20 Occ. N. 428, 7 Brit. Col. L. R. 323.

2. Percentage on earnings.]—The parties contracted that the company defendant should establish and operate lines of railway for the conveyance of passengers in the city, and should pay to the city annually a certain percentage of its gross earnings The company also operated lines of railway outside of the city, which connected with those within the city, and passengers were carried over both for one fare; but the outside lines were operated under concessions from outside municipalities in which they were situate:—*Held*, that the revenue derived by the company from the operation of the outside lines was not subject to the payment of the percentages set forth in the contract. *City of Montreal* v. *Montreal Street Railway Co.*, Q. R. 17 S. C. 439.

See CONSTITUTIONAL LAW, 4.

II. NEGLIGENCE.

1. Damages—*Improper evidence—Misdirection — New trial — Foreign commission.*]—On the trial of an action against a street railway company to recover damages for personal injuries, the vice-president of the company, called on the plaintiff's behalf, was asked on direct examination the amount of bonds issued by the company, the counsel on opening to the jury having stated that the company were making large sums of money out of the road. On cross-examination the witness was questioned as to the disposition of the proceeds of debentures, and on re-examination the plaintiff's counsel interrogated him at length as to the selling price of the shares on the Montreal exchange, and proved that they sold at about 50 per cent. premium. The Judge in charging the jury directed them to assess the damages "upon the extent of the injury plaintiff received, independent of what these people may be, or whether they are rich or poor." The plaintiff obtained a verdict with heavy damages:—*Held*, that on the cross-examination of the witness by defendants' counsel the door was not opened for re-examination as to the selling price of the stock; that in view of the amount of the verdict it was quite likely that the general observation of the Judge in his charge did not remove its effect on the jury as to the financial ability of the company to respond well in damages. The injury of which the plaintiff complained was the crushing of his foot, and on the day of the accident the medical staff of the hospital where he had been taken held a consultation and were divided as to the necessity for amputation. Dr. W., who thought the limb might be saved, was, four days later, appointed by the company, at the suggestion of the plaintiff's attorney, to co-operate with the plaintiff's physician. Eventually the foot was amputated, and the plaintiff made a good recovery. On the trial the plaintiff's physician swore to a conversation with Dr. W., four days after the first consultation and three days before the amputation, when Dr. W. stated that if he could induce the plaintiff's attorney to view it from a surgeon's standpoint and not use it to work on the sympathies of the jury, he might consider more fully the question of amputation. The Judge in his charge referred to this conversation, and told the jury that it seemed to him very important if Dr. W. was using his position as one of the hospital staff to keep the limb on when it should have been taken off, and that he thought it very reprehensible:—*Held*, Strong, C.J., and Gwynne, J., dissenting, that, as Dr. W. did not represent the company at the first consultation, when he opposed amputation; as others of the staff took the same view; and there was no proof that amputation was delayed through his instrumentality; and as the jury would certainly consider the Judge's remarks as bearing on the contention made on the plaintiff's behalf that amputation should have taken place on the very day of the accident, it must have affected the amount of the verdict. To tell a jury to ask themselves, "If I were plaintiff, how much ought I to be paid if the company did me an injury?" is not a proper direction. A party to an action who procures a commission for taking evidence abroad has no right to prevent its return. *Hesse* v. *St. John R. W. Co.*, 20 Occ. N. 113, 30 S. C. R. 218.

2. Excessive speed—*Contributory negligence.*]—A cab-driver was endeavouring to drive his cab across the track of an electric railway when it was struck by a car and damaged. In an action against the tramway company for damages, it appeared that the accident occurred on part of a down grade several hundred feet long, and that the motorman after seeing the cab tried to stop the car with the brakes, and, that proving ineffectual, reversed the power, being then about a car length from the cab. The jury found that the car was running at too high a rate of speed, and that there was also negligence in the failure to reverse the current in time to avert the accident; that the driver was negligent in not looking more sharply for the car; and that, notwithstanding such

negligence on the part of the driver, the accident could have been averted by the exercise of reasonable care:—*Held*, affirming the judgment in 32 N. S. Reps. 117, that the last finding neutralized the effect of that of contributory negligence; that, as the car was on a down grade and going at an excessive rate of speed, it was incumbent on the servants of the company to exercise a very high degree of skill and care in order to control it if danger was threatened to anyone on the highway; and that from the evidence given it was impossible to say that everything was done that reasonably should have been done to prevent damage from the excessive speed at which the car was being run. *Inglis* v. *Halifax Electric Tramway Co.*, 20 Occ. N. 195, 30 S. C. R. 256.

3. Excessive speed—*Injury to married woman — Collision.*] — See *McFarran* v. *Montreal Park and Island R. W. Co.*, Q. R. 15 S. C. 390, Q. R. 9 Q. B. 367, 30 S. C. R. 410, 20 Occ. N. 323, 373.

4. Frightening horses.]—The plaintiff, who was driving a carriage with a pair of horses, stopped near a railway crossing to allow a train to pass. An electric car of the defendants coming in the opposite direction stopped on the other side of the railway crossing for the same reason. The plaintiff's horses were frightened by the train and became restive, and after the train passed the plaintiff waived his hand to the motorman of the electric car as a signal, as he contended, not to start the car. The horses were apparently under control, and the motorman started the car, when the horses became frightened again and ran away:—*Held*, reversing the judgment in 20 Occ. N. 35, 31 O. R. 309, that, as the plaintiff's signal was ambiguous, and as there was apparently no danger, the motorman could not be said to have been guilty of negligence. *Myers* v. *Brantford Street R. W. Co.*, 20 Occ. N. 346, 27 A. R. 513.

SUBROGATION.

See BILLS OF SALE AND CHATTEL MORTGAGES, 5—MECHANICS' LIENS, I.—NEGLIGENCE, 2.

SUBSTITUTION.

See ASSESSMENT AND TAXES, VI. 2—EXECUTION, III. 21 — WILL, I. 10, IV. 3, 4.

SUCCESSION.

Act of heirship — *Sale of effects — Payment of expenses — Beneficiary.*]—The fact that an heir-beneficiary has received before assuming that position certain moneys due to the deceased and has sold certain of his effects by private sale with the object of providing for the expenses of his funeral and final illness, as well as of inventory and advertising, especially when the moneys received were insufficient to defray such expenses, does not constitute an acceptance of the succession pure and simple which deprives the heir-beneficiary of that position. *Walker* v. *Goyette*, Q. R. 17 S. C. 288.

See ADMINISTRATION, I.—CURATOR—HEIRS—WILL, I. 2.

SUCCESSION DUTY.

See REVENUE, II.

SUMMARY CONVICTION.

See CANADA TEMPERANCE ACT—CERTIORARI — COMPANY, IV. 2—CRIMINAL LAW, IX. — JUSTICE OF THE PEACE, 1, 2, 3 — LIQUOR LICENSE ACT.

SUMMARY JUDGMENT.

See JUDGMENT, IV.

SUMMARY TRIAL.

See APPEAL, IX. 3—CRIMINAL LAW, VI. 3, X.

SUNDAY.

1. Lord's Day Act—*Druggist—Selling "ice cream soda"—Medicines — Evidence — Finding—Certiorari.*] — The evidence before the magistrate shewed that on a Sunday two policemen bought "ice cream soda" at the defendant's drug shop and paid 20 cents therefor. One of the policemen swore that he was not ill, and did not get the stuff for medicine, but he also said that nothing was said at the time as to whether either he or the other policeman was ill or not. Evidence was given by physicians to shew that both ice cream and soda water were used as medicines. The magistrate found upon the evidence that

soda water and ice cream were sometimes sold as medicines, and stated that, in his opinion, the sale of these articles mentioned in the evidence was not made as a sale of medicine, although nothing was said by either party on the subject. Upon a motion to quash the conviction, based upon this evidence, for an offence against the Lord's Day Act, it was contended that there was no evidence that the articles were not sold as medicines:—*Held*, that the finding of the magistrate upon a question of fact within his jurisdiction would not be reviewed upon *certiorari*, but the defendant's remedy, if any, was by appeal. *Regina* v. *Howarth*, 33 U. C. R. 537, not followed. *Regina* v. *Urquhart*, 20 Occ. N. 7.

2. Lord's Day Act—*Victualling house keeper—Supplying food—Ice cream.*]—*Held*, under the circumstances set out in the opinion, that supplying ice cream to the complainants on a Sunday was the supplying a refreshment in the nature of a light meal in the ordinary course of the defendant's business as a victualling house keeper, and was not an offence against the Lord's Day Act, R. S. O. c. 246. A person carrying on the business of a victualling house keeper cannot make any distinction as to whom he supplies, or what he supplies, provided it is food or victuals; and "ice cream" is a food. *Regina* v. *Albertie*, 20 Occ. N. 123.

SUPERIOR COURT, QUEBEC.

See APPEAL, X., XI.—COURTS, VII.

SUPREME COURT OF BRITISH COLUMBIA.

See APPEAL, I.

SUPREME COURT OF CANADA.

See APPEAL, XII.-XVI. — COSTS, IX. 5, 11.

SUPREME COURT OF NOVA SCOTIA.

See APPEAL, IV.

SURETY.

See HUSBAND AND WIFE, IX.—MUNICIPAL ELECTIONS, I. 10—PRINCIPAL AND SURETY.

SURRENDER.

See LANDLORD AND TENANT, VII.

SURVIVAL OF ACTION.

See EXECUTORS AND ADMINISTRATORS, 3, 10.

SURVIVORSHIP.

See HUSBAND AND WIFE, X. — WILL, I. 8.

TAVERNS.

See MUNICIPAL CORPORATIONS, IV. 8.

TAXATION OF COSTS.

See COSTS, VII.—SOLICITOR, V.

TAX SALE.

See ASSESSMENT AND TAXES, VI.

TAXES.

See ASSESSMENT AND TAXES.

TELEPHONE.

See ASSESSMENT AND TAXES, V. 5—WAY, V. 4.

TENANT FOR LIFE.

Renewal of lease—*Carrying on business on premises — Profits—Account.*]—A widow was entitled under her husband's will to the use and enjoyment of all his property during her life. It was conceded that she was entitled to the enjoyment in specie of the personal estate. The testator owned a brick-field on leasehold land, which was a going concern at the time of his death. This and the plant in connection therewith the tenant for life took possession of, and went on with the working of it. She put other assets of the estate into this business and extended it, and when she died it was still a going concern. At the expiration of the term of her husband's lease, she obtained a new one, covering a larger area of land:—*Held*, that the widow, having elected to carry

on the business on these premises, did so for the ultimate benefit of the estate. She was entitled to all the income, earnings, and profits derivable therefrom each year, in so far as she applied them to the maintenance of the family, or in the acquisition of other property, or in the paying off of mortgages; but whatever profits went into the business to increase it, and whatever plant, stock, and belongings of the business remained on the premises or elsewhere at her death, became the property of the husband's estate. An account against her executor was directed, and the scope of the inquiry defined. *Wakefield* v. *Wakefield*, 20 Occ. N. 255, 32 O. R. 36.

TENANTS IN COMMON.

See CONVERSION—PETITION, 1—TRUSTS AND TRUSTEES, 5.

TENDER.

See MUNICIPAL CORPORATIONS, V. — SALE OF GOODS, VI. 2—SHIP, 9.

THEFT.

See CRIMINAL LAW, VI., VIII. 3.

THIRD PARTIES.

See PARTIES, II.

TIMBER.

See CROWN, III.—WATER AND WATERCOURSES, II. 3.

TIME.

See APPEAL, I. 5, 6, 7, VI. 4, 5, 6, X. 1, 2 — ARREST, III. 3, 9—ATTACHMENT OF DEBTS, II. 5 — BANKRUPTCY AND INSOLVENCY, II.—BILLS OF SALE AND CHATTEL MORTGAGES, 3—CERTIORARI, 5—COMPANY, IV. 2—CONTRACT, II. 1 — COURTS, V. 1—EVIDENCE, V. 2—EXECUTION, III. 1, 2, 5, V.—HUSBAND AND WIFE, VIII. 6 — JURISDICTION, 2—LIMITATION OF ACTIONS, 3, 4, 8, 12—LIQUOR LICENSE ACT, V. 2 — MECHANICS' LIENS, III. 2—MINES AND MINERALS, I. 1—MOTION, 2 — MUNICIPAL CORPORATIONS, II. 1, XIII. 2 — MUNICIPAL ELECTIONS, I. 11—PARLIAMENTARY ELECTIONS, II. 2—PARTICULARS, I. 4, 8 — PLEADING, V. 4, VII. 3—TRIAL, V. 2—VENDOR AND PURCHASER, 9 — VENUE, 2 — WAY, II. 1, VI. 1.

TOLL ROAD.

See WAY, IX.

TOLLS.

See CONSTITUTIONAL LAW, 7 — RAILWAYS AND RAILWAY COMPANIES, XII.

TOWAGE.

See SHIP, 9.

TRADE AGREEMENT.

See CONTRACT, I. 10.

TRADE AND COMMERCE.

See CONSTITUTIONAL LAW, 3.

TRADE - MARK AND TRADE - NAME.

1. Infringement—*Defence—Non-registration—Invalidity.*]—The defendant in an action for infringement of a trade-mark may plead that there was no registration of the trade-mark, and also that the alleged trade-mark was invalid. *Grand Hotel Co.* v. *Carlin*, 2 Q. P. R. 489.

2. Sale of business — *Right to use name.*]—The proprietor of a firm name of no pecuniary value *per se*, and not being merely his own name, who has sold the business with which it was connected, and with it the right to use the firm name for a limited period, cannot, after the expiry of the time, prevent the user of such name, when he himself does not carry on or intend to carry on business under it. *Love* v. *Latimer*, 20 Occ. N. 456, 32 O. R. 231.

3. Use of word — *Pleading.*]—In an action for selling, in violation of plaintiff's right, what purports to be asbestic wall plaster, stamped and labelled as such, it is pertinent for the defendant to plead that he has, before and since the registration of plaintiff's trade-marks, sold asbestic wall plaster, and he has a right to describe it as such. *Asbestic and Asbestos Co.* v. *Solater*, 2 Q. P. R. 467.

TRADING STAMPS.

See MUNICIPAL CORPORATIONS, XV. 3.

TRANSFER.

See MINES AND MINERALS, I. 6.

TRANSFER OF ACTIONS.

See COURTS, I. 1, V. 2, VII. 4, 5—PROHIBITION, I. 1—STATUTES, II. 2.

TRANSIENT TRADERS.

See MUNICIPAL CORPORATIONS, XV.

TREASON.

See CRIMINAL LAW, VII. 10.

TREATY.

See CONSTITUTIONAL LAW, 8, 9.

TRESPASS.

I. TO GOODS.
II. TO LAND.
III. TO PERSON.

I. TO GOODS.

Bailiff — *Recourse against—Pleading—Amends.*]—A creditor whose bailiff has by error made a seizure of goods on the premises of a person other than the defendant will be relieved from liability upon paying an indemnity and giving up the effects seized, and will have recourse against the bailiff for reimbursement. —The bailiff, if he has promised to pay the amount, will not be allowed later, in a suit for the recovery thereof, to plead that the creditor should have waited until sued by the person whose goods were thus wrongfully seized and then brought in the bailiff *en garantie*; his acknowledgment of the debt deprives him of the right so to plead. *Bédard* v. *Trudeau*, 3 Q. P. R. 75, Q. R. 17 S. C. 336.

II. TO LAND.

1. Maintenance of action for — *Year's possession—Agreement to purchase.*] —The appellant being a mortgage creditor of one L. for about $475, the latter proposed by letter to sell him the land for $425. In answer the appellant offered $400, which L. accepted, on condition that the appellant, before taking possession, should satisfy himself that the respondent would not take the land at this price. The appellant communicated the offer to the respondent, and, upon the refusal of the latter to buy, took possession of the land. No money was paid:—*Held*, that, under the circumstances, the consensus having made the sale complete, the appellant could join his possession to that of L. to make up the year's possession, if that were necessary in trespass as well as ejectment (and *quære* as to this), the action being against the respondent, who had disturbed the appellant's possession. *Beauchemin* v. *Latraverse*, Q. R. 9 Q. B. 56.

2. Right of reversioner to maintain—*Injury to possession — Action in case.*]—A tenant for years, not in possession, cannot maintain trespass against a defendant who enters upon the land without objection on the part of those actually in possession; nor can he recover in case, unless there is evidence of an act necessarily injurious to the reversion or in denial of his right. Where the declaration is in trespass, and the plaintiff on the trial relies upon and directs all his evidence to proving injury to his possession, the attention of the trial Judge not being in any way called to the fact that he was proceeding for injury to the reversion, he cannot afterwards, upon a motion to set aside a nonsuit and enter a verdict for himself, claim the right under 60 V. c. 24, s. 95, to have a verdict entered for him in case as if he had declared for and proved damages to his reversionary interest. *McDougall* v. *Campbellton Water Supply Co.*, 31 N. B. Reps. 467.

See CRIMINAL LAW, VII. 11—EXECUTORS AND ADMINISTRATORS, 10.

III. TO PERSON.

See HUSBAND AND WIFE, I. 5—JUSTICE OF THE PEACE, 5.

TRIAL.

I. COPY OF PLEADINGS FOR JUDGE.
II. ENTRY FOR TRIAL.
III. EXCLUSION OF WITNESSES.
IV. JURY.
V. JURY NOTICE.
VI. NOTICE OF TRIAL.
VII. POSTPONEMENT OF TRIAL.
VIII. SPEEDY TRIAL.
IX. STAY OF TRIAL.
X. UNDERTAKING AS TO TRIAL.

See COSTS, VII. 4, 11, IX. 9—CRIMINAL LAW — DEFAMATION, 7 — INJUNCTION, II. 2 — JUDGMENT, IV. 3 — MECHANICS' LIENS, II. 3 — NEW TRIAL——PARLIAMENTARY ELECTIONS, II. 3 — VENUE.

I. COPY OF PLEADINGS FOR JUDGE.

1. Necessity for.] — The record for the Judge fulfills the requirements of the law if it contains sufficient of the pleadings and proceedings for the information of the Judge, and it is not necessary to give him a copy of a reply or of a rejoinder which contains only a denial of the facts alleged. *County of Nicolet* v. *Toussignant*, Q. R. 9 Q. B. 356.

2. Setting down without.] — Notwithstanding Art. 295, C. P., which provides that no cause may be placed upon the list until a copy of the pleadings has been produced at the record office for the use of the Judge presiding at the trial, the inscription of a case upon the list without such production will not be set aside upon motion, such copy not being imperatively required by the enactment, and the Judge in like cases being able to exercise his discretion in the application of Art. 295. *Menier* v. *Divers*, 2 Q. P. R. 389.

See II. 1.

II. ENTRY FOR TRIAL.

1. Desistment — *Re-entry — Costs — Copies of pleadings—Discretion—Dismissal of action.*]—A party who desists from any proceeding may proceed anew when no costs have been incurred.—Where a party has desisted from a setting down of an action for trial before the lapse of the proper time, he can set it down again without having to pay costs as a condition precedent.—The Court of first instance, being seised of a cause, has discretion to determine whether the copies of the proceedings produced are sufficient, according to the requirements of the law, for understanding the case. —*Semble*, that the Superior Court may dismiss an action in default of proof, reserving to the plaintiff the right to apply, although the plaintiff has set down an appeal from an order upon a motion to strike the case out of the list of cases for examination and hearing. *County of Nicolet* v. *Toussignant*, 3 Q. P. R. 239.

2. Irregularity — *Re-entry—Costs.*]—Where an action has been improperly entered for trial, the entry may be withdrawn and another substituted for it, the first being without effect; and the only costs to which the attorney is entitled are the costs of the motion to strike out the first entry, if such motion has been made. *County of Nicolet* v. *Toussignant*, Q. R. 9 Q. B. 356.

See VI. 2.

See ACTION, 3.

III. EXCLUSION OF WITNESSES.

Evidence — *Parties to action.*]—The mere fact that a party intends to give evidence does not entitle the other party to call for his exclusion as in the case of an ordinary witness. If a party has been wrongfully excluded, it is not necessary for him to shew that he was substantially prejudiced thereby in order to get a new trial. *Quære*, in case of harmless exclusion. *Bird* v. *Vieth*, 7 Brit. Col. L. R. 31.

IV. JURY.

1. Failure to agree — *Dismissal of action.*]—When in an action tried with a jury the presiding Judge holds that there is evidence to submit to the jury and refuses a nonsuit, he cannot, upon the jury disagreeing, himself decide under Rule 780 in the defendant's favour upon his own view of the evidence. Judgment in 30 O. R. 635, 19 Occ. N. 194, affirmed. *Floer* v. *Michigan Central R. W. Co.*, 20 Occ. N. 204, 27 A. R. 122.

2. Incompetency of jurors.] — A new trial was ordered, upon payment of costs, where it was shewn that one of the jurors was not selected to be of the panel, that another was so deaf that he was not able to hear some of the most important evidence, and that a third was in such friendly relations with the defendants, an incorporated company, as should have induced him to decline to sit on the trial. *Cameron* v. *Ottawa Electric R. W. Co.*, 20 Occ. N. 304. 32 O. R. 24.

3. Retirement of—*Evidence for Court alone.*]—Trial by jury. The securities, the subject-matter of the action, having been lost after action brought, the plaintiffs were proceeding to prove the loss, when the Judge proposed to allow the jury to retire pending the giving of the evidence. Counsel for the plaintiffs objected:—*Held*, that on a trial by jury after the plaintiffs' case has commenced the Judge may permit the jury to retire in his discretion while proof is being given of facts with which the Judge alone is concerned. *Bank of British Columbia* v. *Oppenheimer*, 20 Occ. N. 370.

4. Verdict — *Misapprehension—Assignments and preferences—Fraudulent assignment.*[—In an action brought by plaintiff as assignee of M., against defendant, the sheriff of the county of Queens, who levied under execution on a portion of the goods covered by the assignment, the defence relied upon was that the deed of assignment was made fraudulently, with intent to hinder and delay creditors. It appearing that the jury had no difficulty in determining the only question upon which they had to pass, and their verdict being in accordance with that finding :—*Held*, that it could not be disturbed upon any reason based upon the circumstances under which it was rendered. Townshend, J., dissented, on the ground that there was no evidence to justify the verdict, and that it was given in disregard or misapprehension of the instructions of the Judge. *Fraser* v. *Drew*, 32 N. S. Reps. 385.

See CRIMINAL LAW, VII. 10, VIII. 3, 4—MASTER AND SERVANT, IV. 7—MALICIOUS PROCEDURE, 2— RAILWAYS AND RAILWAY COMPANIES, IX.—STATUTES, II. 2.

V. JURY NOTICE.

1. Exclusive jurisdiction of Chancery—*Legal and equitable issues.*] — The plaintiffs' claim was to enforce a charge against the defendant's lands and for a personal order or judgment for immediate payment of the sum for which they asserted the charge :—*Held*, not such an action as would have been, before the Administration of Justice Act of 1873, within the exclusive jurisdiction of the Court of Chancery, within s. 103 of the Judicature Act, R. S. O. c. 51. There being, therefore, legal and equitable issues raised, and notice for a jury given, Rule 551 applied, and the action should be entered for trial at a jury sittings. *Sawyer* v. *Robertson*, 20 Occ. N. 254, 19 P. R. 172.

2. Proceeding to trial—*Time — Extension.*]—The time which Art. 442, C. P. C., allows for proceeding upon a demand for trial by jury is not extended by the fact that the party who elects for such trial has obtained the issue of a foreign commission returned for less than 30 days, nor by the fact that such party has been allowed to amend one of his pleadings, after the expiration of 30 days from the time that the cause is ripe for trial, that is to say, after issue joined. *Foley* v. *Foley*, Q. R. 17 S. C. 480, 3 Q. P. R. 53.

VI. NOTICE OF TRIAL.

1. Close of pleadings.] — A reply delivered by the plaintiff joining issue upon the statement of defence and further alleging that the facts set forth in the defence were no answer to the claim:—*Held*, a joinder of issue "simply, without adding any further or other pleading thereto," within the meaning of Rule 262 ; and therefore that when it was delivered the pleadings were closed, and a notice of trial thereupon served was regular. *Gibson* v. *Nelson*, 20 Occ. N. 426, 19 P. R. 265.

2. Waiver—*Entry for trial—Motion to strike off — Non-appearance — Action dismissed for—Appeal—Costs.*] — Defendants after giving notice of trial accepted service of a replication pleaded by plaintiff, without making any objection thereto :—*Held*, that they thereby waived the notice and admitted that the cause was not at issue when it was given. Where defendants subsequently gave another notice, which was admittedly defective, and entered the cause on the docket of causes for trial :—*Held*, that the cause was improperly entered and that a motion to set aside the notice, and to strike the cause off the docket, should have prevailed. Plaintiff did not appear at the time at which the cause was entered for trial, and an order was obtained by defendants under O. 34, R. 33, dismissing the action for non-appearance :—*Held*, that there was an appeal from the order so made, and that plaintiff was not limited to an application, under the order, to have the judgment set aside. *Per* Meagher, J. (dissenting), that there should be no costs, as the difficulty appeared to have arisen from a misunderstanding between solicitors. *Cummings* v. *Pickles*, 32 N. S. Reps. 489.

VIII. POSTPONEMENT OF TRIAL.

Costs — *Inspection of mining land.*]—The defendants got an order at the trial for the inspection of a vein in the plaintiffs' claim, which they alleged was the continuation of a vein the apex of which was within the limits of their own claim, and the plaintiffs, alleging that such order necessitated inspection by them of other similar places on their property, with a view of furnishing evidence to rebut that which might be adduced by reason of the defendants' inspection, and therefore an adjournment for that purpose, were allowed the adjournment, but only on the terms that all costs occasioned thereby should be borne by them in any event :—*Held*, on appeal, that such costs should abide

the result of the issues to which the inspection related. *Iron Mask* v. *Centre Star*, 7 Brit. Col. L. R. 66.

See COSTS, VII. 16, 18—PARTICULARS, I. 5.

VIII. SPEEDY TRIAL.

Prejudice.]—When the sum in litigation (in this case an alimentary allowance) is the only resource of the party seeking it, to whom serious prejudice will arise if the cause is not heard until it is reached in its place on the list, the Judge may order that the cause shall be called on as soon as possible. *Jones* v. *Moodie*, 3 Q. P. R. 163.

IX. STAY OF TRIAL.

Action for arrest — *Appeal pending from judgment of acquittal.*] — It is convenient to suspend the hearing of an action for damages resulting from an arrest, when there is an appeal pending from the order dismissing the complaint upon which the arrest was made, and this appeal has not yet been decided by the Court of Queen's Bench, criminal side. *Papineau* v. *Nesbitt*, 3 Q. P. R. 88.

X. UNDERTAKING AS TO TRIAL.

Judgment.] — An undertaking, embodied in an order, that the plaintiff should not proceed further, until the trial of the action, with his application for a certificate of improvements, is substantially complied with if no proceedings are taken until after judgment pronounced, though something be done before the judgment is drawn up and entered. *Dunlop* v. *Haney*, 7 Brit. Col. L. R. 300.

TRUSTEE LIMITATION ACT.

See EXECUTORS AND ADMINISTRATORS, 6, 7.

TRUSTEE RELIEF ACT.

See EXECUTORS AND ADMINISTRATORS, 7.

TRUSTS AND TRUSTEES.

1. Action by trustees—*Executors of deceased trustee — Joinder.*]—By a marriage contract a trust as to $10,000 was created by the wife for the benefit of herself and husband as to income and as to the capital for the benefit of the children of the marriage, and five trustees were appointed, the husband being one of them. The marriage took place in 1862, and in 1866 the wife died. Afterwards one of the trustees died and others resigned and were replaced. In January, 1899, the husband died, leaving two children. By his will he appointed one child and two other persons his trustees and executors:—*Held*, that an action with respect to part of the trust estate instituted by the four surviving trustees and the executors and trustees of the fifth (deceased) was regular as regards form, inasmuch as their administration was joint, like that of the members of a syndicate. *Kennedy* v. *Housman*, Q. R. 17 S. C. 311.

2. Commission — *Personal estate—Income—Investments.*]—No fixed rule can be laid down as to the commission trustees will be allowed by the Court, as each case must be governed by its own circumstances, and by a consideration of the trouble experienced in the management of the estate. Where trustees of an estate consisting of stocks and mortgages received under the deed of trust a commission of five per cent. on income, a commission on the estate was refused, but a commission of one per cent. was allowed on investments made by them. *In re Wiggins Estate*, 20 Occ. N. 462.

3. Costs — *Set-off — Beneficiary.*] — Trustees cannot set up as a set-off to the claim of one of the beneficiaries for his share of revenue declared not seizable, the amount which such beneficiary owes for the costs of an action for removal of one of the trustees from his office, and paid by the trustees upon dismissal of such action.—A trustee may charge to the trust the costs which he has incurred in an action to remove him from the office which has been dismissed; and trustees can also charge to the trust the costs of an action which their solicitors have begun against them to force them to pay such costs. *Brunet* v. *Brunet*, Q. R. 17 S. C. 490.

4. Grant on condition — *Revocation—Release.*]—The owner of land, "in consideration of natural love and affection and of one dollar," conveyed it to the defendants in fee, subject to a life estate in his own favour, and "subject to the payment thereout by the (defendants)" of certain sums to the plaintiffs; the deed being voluntary as to them. The deed contained a covenant by the defendants with the grantor to make the payments, and was executed by the grantor and the defendants. Seven months later the grantor conveyed the same land to the defendants in fee, for

their own use absolutely, free from all incumbrances : — *Held*, that an irrevocable trust was created by the first deed in favour of the plaintiffs, and was enforceable by them, and that this trust was not affected or released by the second deed. *Gregory* v. *Williams*, 3 Mer. 582, and *Mulholland* v. *Merriam*, 19 Gr. 288, applied. *Edmison* v. *Couch*, 19 Occ. N. 383, 26 A. R. 537.

5. Powers — *Party wall — Tenants in common—Deed—Description.*] — M., owner of two warehouses, Nos. 5 and 7 (the dividing wall being necessary for the support of both), executed a deed with power of sale of No. 5, by way of marriage settlement on his daughter. M. having died, his executors executed a deed of confirmation by the purchaser of No. 5 from the trustees of the marriage settlement by a description which, it was claimed by the purchaser, conveyed absolutely the freehold estate in the party wall and the land covered by it. An action being brought by the executors of M. to have it declared that the wall in question was a party wall :— *Held*, that the trustees of the will and marriage settlement were bound by the trust declared in the instruments under which they derived their powers, and even if it could be shewn that the confirmation deed had the effect of conveying a greater quantity of land than the deed from the trustees of the marriage settlement, such a voluntary conveyance in favour of one beneficiary, which would operate prejudicially to the interests of the other beneficiaries, would be a breach of trust and consequently void: —*Held*, that, upon the execution of the deed by way of marriage settlement of No. 5, the wall common to the two warehouses, Nos. 5 and 7, became a party wall of which the owners of the warehouses were tenants in common. *Lewis* v. *Allison*, 19 Occ. N. 372, 30 S. C. R. 173.

6. Public harbour — *Alienation of property — Powers — Injunction — Private person.*] — A private individual is not entitled to an injunction to restrain a public corporation such as the Montreal Harbour Commissioners from entering into a contract with third parties, unless he shews that some private right pertaining to him has been invaded, and that a private injury, separate and distinguishable from the injury to the public generally, will be caused to him by the contract alleged to be *ultra vires*.— 2. Although trustees of public property cannot alienate the property of the trust in perpetuity, and although all rights granted must be for a limited time only, nevertheless an alienation or grant of exclusive occupation of wharves by harbour commissioners for forty years, for the due fulfilment of the objects of the trust, is not in excess of their powers; and the contract in the present case by which the Montreal Harbour Commissioners proposed to grant to a syndicate for a term of forty years the exclusive use and occupation of certain wharves, for the purpose of constructing elevators thereon, was valid. *Taylor* v. *Montreal Harbour Commissioners*, Q. R. 17 S. C. 275.

7. Sale of lands—*Approval of Court.*] —Trustees, having unsuccessfully offered for sale *en bloc* property of the trust estate, consisting of a hotel and stores and a dock, and subsequently the hotel and stores without the dock, received an offer for the hotel by itself:— *Held*, on an application to the Court to approve and confirm the sale under R. S. O. c. 129, s. 39, and Rule 938, that the Court had jurisdiction to express its approval, and that, under the circumstances, it was a case in which the jurisdiction ought to be exercised. *In re Crawford—Nelson* v. *Bell*, 20 Occ. N. 380, 32 O. R. 118.

See BANKRUPTCY AND INSOLVENCY, I. 5—CHURCH, 1—CROWN, III. 2—EXECUTORS AND ADMINISTRATORS — INFANT, III. 2—PARTIES, I.—SCHOOLS, 4.

USE AND OCCUPATION.

Foreign consul—*Personal liability for office rent.*] — The defendant, a foreign consul, was personally sued for use and occupation of certain rooms which had been used by him and his predecessor as the consulate office. When the defendant assumed office, a lease from the plaintiff to the former consul was current, but was not assigned to the defendant. The rent had in fact been paid by the foreign Government through the former consul, and the lease had been submitted to the Government and approved by it, both to the knowledge of the plaintiff. The plaintiff did not demise or attempt to demise to the defendant :—*Held*, that the defendant was not liable. *Duncombe* v. *Burke*, 20 Occ. N. 241.

See VENDOR AND PURCHASER, 8.

USUFRUCT.

Separation from property — *Reunion—Condition as to alienation—Sale—Defence.*] — The appellant had made a gift of land to his daughter subject to the payment of mortgages and to a charge for maintenance of the donor and his family, and afterwards the daughter

gave the land to her brother, with the stipulation that he would allow the appellant the usufruct of it, such usufruct being untransferable and unseizable. The brother afterwards gave the land to the appellant, subject to all the provisoes and conditions imposed by his sister's gift to him. The appellant sold the land to one R., now represented by the respondent, with a proviso for redemption, but, when R. wished to take possession at the expiry of the period fixed for redemption, the appellant pleaded that the usufruct was untransferable and that he could not dispose of it :—*Held*, that the acquisition of the usufruct of a property, by virtue of one title, and the acquisition of the bare property, by virtue of a subsequent title, in spite of the fact that these different titles have united the usufruct and the property in the same person, cannot have the effect of annulling the conditions contained in the prior title transferring only the usufruct; that the exercise of the rights of usufruct and bare property in a parcel of land is regulated by the title of acquisition of each of these rights, and the conditions to which they are separately subject are not affected by the reunion of the two rights in the same person.— 2. That the defence of alienation, in this instance, was made to protect the donee of the usufruct, and, therefore, he could not dispose of this usufruct, and could himself attack the alienation which he had made. *Gagnon* v. *Gagnon*, Q. R. 9 Q. B. 62.

VACATION.

Motion for interim alimony.]—During long vacation the Court or Judge has no jurisdiction to adjudicate upon a motion for an allowance for interim alimony. *Rivet* v. *Gagnon*, 3 Q. P. R. 214.

VENDOR AND PURCHASER.

1. Agreement as to taxes—*Special sewer rate—Date of assessment.*]—On the 4th May, 1894, the plaintiff and defendant made an exchange of properties and covenanted reciprocally "to pay all taxes and assessments for which the said properties may be liable from and after the 1st day of April, 1894." Before the exchange, in September, 1893, the city of Montreal had decided to construct a sewer in Woodstock avenue—where the property received by the defendant in exchange was situated—the cost whereof was to be borne by the owners of land bordering on the avenue. The sewer was constructed in October, 1893, and on the 7th May, 1894, a special assessment roll dividing the cost among the owners on the avenue was signed and deposited in the office of the city treasurer for purposes of collection. The name of the plaintiff was entered on the roll as a contributory, and he was obliged to pay the taxes thus imposed. He brought this action for reimbursement :—*Held*, reversing the judgment in Q. R. 9 S. C. 300, that, in spite of the fact that the roll had not been signed until the 7th May, 1894, the property in question was, before the 1st April, 1894, affected and pledged for the payment of the cost of the sewer, and the plaintiff alone should bear the special tax which had been imposed upon him. *Rochon* v. *Hudson*, Q. R. 16 S. C. 356.

2. Execution against vendor—*Registration of purchaser's title.*]—Where the vendor has continued in open and public possession of the immovable sold, and the title of acquisition had not been registered by the purchaser until after the seizure of the property by a third party, under a judgment against the vendor, the registration is without effect as regards the seizing party. *Bernard* v. *Demers*, Q. R. 17 S. C. 402.

3. Expulsion of vendor—*Damages.*]—The vendor who has engaged to give immediate possession of the land sold, and who neglects or refuses to do so, has, nevertheless, a remedy in damages against the purchaser if the latter expels him by force and violence.. *Robichaud* v. *Genest*, Q. R. 16 S. C. 337.

4. Fees on sale of land—*Non-payment — Non-registration—Effect of—Statute—Repeal.*]—*Held*, that a sale made by the plaintiff, out of the Province of Quebec, of land in that Province to the defendant domiciled there ((55 & 56 V. c. 17, s. 3, relating to dues payable upon transfer of land, being in force at the time), was radically and absolutely void, the defendant not having paid the dues which he was bound to pay, nor registered his title within the time prescribed; and the vendor was in a position to set up this nullity, which is *d'ordre public*.—The repeal of the statute has not rendered valid acts made void *de plano* by default of the carrying out in due time of the formalities required. *Nadeau* v. *Pouliot*. Q. R. 17 S. C. 184.

5. Fraudulent representation — *Value of land—Rental—Abatement of price—Exchange.*]—A person, who has bought a specific immovable property after due examination, and has received delivery of the same, but who alleges that his consent to the contract was obtained by a fraudulent representation of the vendor which had the effect of increasing the buyer's estimate of the value of the

property, and of inducing him to buy at a price exceeding that which he would have given if the fraud had not been practised, cannot, while adhering to the contract and retaining the property, bring an action to get back part of the price.—2. General statements by a vendor as to the renting value of the immovable property sold, without any representation as to the actual rental, are not grounds of nullity, and do not give rise to an action for the recovery of part of the price paid.—3. In an action *quantum minoris*, it is necessary to prove that the buyer gave more than the real value of the property, and where the contract is one of exchange, the party complaining must establish that he suffered loss by the exchange.—4. In any event where representations are made by vendor to purchaser, as to rental value of the property sold, they are not to be considered as extending beyond the termination of the current leases. *Bailey* v. *Reinhardt*, Q. R. 17 S. C. 387.

6. Purchase money — *Instalments—Default — Place of payment—Necessity for demand—Re-sale—Possession.*] — Upon an agreement to sell land, where the price is to be paid by monthly instalments, and in default of payment of any instalment, the vendor, who is not to part with the possession of the property, is to be at liberty at any time, after the maturity of any instalment, to retake the land without any expense and without legal proceedings, the payments already made being considered as rent, it is the duty of the purchaser to seek out the vendor and pay the instalments to him, the payment thereof being the condition of his right to continue to occupy the land, and he cannot defend himself against an action for the recovery of the land, for default of payment of instalments, by pleading that, in the absence of any provision for a place of payment, payment should have been demanded at his own abode.—The vendor, having, upon the purchaser's default, resold and promised to deliver possession to a new purchaser, has a sufficient interest to sustain a demand upon the first purchaser to put the second in possession. *Joyal* v. *Rochefort*, Q. R. 17 S. C. 12.

7. Purchase money — *Instalments—Default — Rescission.*] — The plaintiff's claim was for payment of an instalment of the purchase money overdue on an agreement of sale of a hotel property to defendant, which provided that, upon default in payment, the plaintiff might determine the contract by notice in writing. After the due date of the instalment defendant notified plaintiff that she would not carry out her contract, and about twelve days later plaintiff, without giving defendant any notice, entered into a binding agreement of sale of the property to a third party. He then brought this action:—*Held*, following *Sawyer* v. *Pringle*, 18 A. R. 218, *Sawyer* v. *Baskerville*, 10 Man. L. R. 652, and *McCord* v. *Harper*, 26 C. P. at p. 104, that the plaintiff had practically rescinded the contract of sale to defendant and could not thereafter sue upon it. *Parent* v. *Bourbonnière*, 20 Occ. N. 358, 13 Man. L. R. 172.

8. Purchase money — *Instalments—Default — Use and occupation—Contract—Rent.*] — The plaintiff had promised to sell land to the defendant for $1,000, upon which $50 had been paid. The difference, $950, was payable in 19 years by half-yearly payments of $25, with interest at six per cent., and the plaintiff was to give a deed when the defendant should have paid $500; but, if the latter should make default in two payments, he was to lose all his rights under the agreement, without reimbursement of the sums paid. By the same instrument the plaintiff leased the same land to the defendant for 10 years, at an annual rent of $57, which represented interest at six per cent. upon the $950, which rent was to be diminished according to the sums paid upon the purchase price. The plaintiff having sued for one year's interest, the defendant alleged that, by default in payment of two instalments, the contract had been rescinded, and that he owed nothing:—*Held*, that the rescission of the contract was discretionary with the plaintiff, and that, in any event, as the defendant had had the enjoyment of the land for one year, he should, even in the case of his default to meet the two payments having effected the dissolution of the contract, pay to the plaintiff the year's interest as to the value of this enjoyment, for otherwise the parties would not be remitted to the same position as they were in before the contract. *Picard* v. *Renaud*, Q. R. 17 S. C. 353.

9. Purchase money—*Payment—Time — Default — Rescission.*]—A stipulation upon a sale of land upon terms of credit that time shall be of the essence of the contract does not constitute a binding contract and does not give a right to the vendor to claim rescission of the sale in default of payment of the price at the time agreed upon. *Carroll* v. *Drolet*, Q. R. 16 S. C. 329.

10. Sale pendente lite — *Creditors attacking vendor's title—Purchaser in good faith.*]—One who has in good faith purchased land while an *action paulienne* is pending for the purpose of impeaching the title of the grantor of the vendor, who also purchased after the commencement of the action, cannot, when the

action paulienne has been successful, demand the rescission of the sale by alleging fear of eviction, the judicial revocation of the sale made in fraud of creditors of the vendor not affecting the rights of purchasers or mortgagees in good faith, even when such rights arose during the action for revocation. *Barsalou* v. *Royal Institution for Advancement of Learning*, Q. R. 5 Q. B. 383, followed. *Laramée* v. *Collin*, Q. R. 16 S. C. 346.

11. Warranty of title — *Eviction—Special agreement — Damages.*]—A sale of land, including a dam, was accompanied by a warranty of the vendor of his title. The vendee, having been evicted from the portion of the premises used for the dam, brought an action to recover back the price he paid, and for damages. The vendor tendered the price and costs of resisting the action for eviction, but denied liability for damages on the ground that there was no special agreement as to the cause of eviction under Art. 1512, C. C.:—*Held*, that the warranty of title did not constitute a special agreement which would entitle the vendee to damages under Art. 1512, C. C. *Allan* v. *Price*, 20 Occ. N. 432.

See APPEAL, X. 4, XIII. 3—COURTS, IV. — EASEMENT, 3—EXECUTION, IV. — INFANT, III. 3 — RES JUDICATA, 2 — SPECIFIC PERFORMANCE — TRESPASS, II. 1.

VENUE.

1. Change of—*Grounds for—Criminal libel—Political bias.*]—*Held*, that in criminal libel, in order to obtain a change of venue, it is not sufficient to allege that the prosecutor is interested in politics in the place where the libel is alleged to have been committed, and that therefore the defendant cannot obtain a fair trial. The fact that two abortive trials have taken place is not *per se* a reason for change of venue. *Regina* v. *Nichol*, 20 Occ. N. 319, 7 Brit. Col. L. R. 278.

2. Motion to change—*Time for.*]—Application by the defendant to change the place of trial. A defence had been put in, but the time for replying had not elapsed. The plaintiff's solicitor made affidavit that he intended specifically to reply:—*Held*, following *Kidd* v. *Henderson*, 20 N. S. Reps. 441, that the application was premature. Such an application should not in general be made until after issue joined or until it could clearly be seen what the issues would be. The defence raised many different questions, but, until the replication was in, no one could say whether or not the defendant would be obliged to sustain the whole of them by evidence. *Balcom* v. *Croft*, 20 Occ. N. 412.

3. Residence of plaintiff — *Statement of claim.*]—Rule 529 provides that: (*a*) the plaintiff shall, in his statement of claim, name the county town at which he proposes that the action shall be tried; (*b*) where the cause of action arose and the parties reside in the same county, the place so to be named shall be the county town of that county:—*Held*, that the residence of the plaintiff at the time of the delivery of the statement of claim, and not at the time of the issue of the writ of summons, is the time referred to in Rule 529 (*b*). *Edsall* v. *Wray*, 20 Occ. N. 389, 19 P. R. 245.

4. Writ of summons—*Indorsement—Election.*]—Where in the special indorsement of his writ of summons the plaintiff names a place of trial, he is not at liberty to change by naming another place in his statement of claim. Rule 529 must be read subject to the provision of Rule 138 (2). *Segsworth* v. *McKinnon*, 20 Occ. N. 262, 19 P. R. 178.

VERDICT.

See JUDGMENT, V. 5—NEW TRIAL, 1, 2—TRIAL, IV. 4.

VESTED INTEREST.

See SETTLEMENT—WILL, I. 3.

VIEW.

See DISCOVERY, II. 3.

VOLUNTARY ASSOCIATION.

Member—*Fine—Action for—Pleading.*]—A voluntary association may exist and sue and be sued in the name of its members.—The fact that the parties signed a deed of association constitutes them members of that association, and it is not necessary to allege that they had made the necessary application, and were competent to be members of the association.—If a member fails to comply with the rules of an association, and thereby incurs a fine and forfeiture of his membership, the remaining members, suing him for the amount of the stipulated fine, are not obliged to render him any account for the fine demanded. An allegation that the defendant refuses

to comply with the conditions of membership is a sufficient *mise en demeure*, in an action for the recovery of a fine. *Arcand* v. *Hamelin*, 2 Q. P. R. 437.

VOTERS' LISTS.

See COSTS, VII. 8.

WAGER.

See PROHIBITION, II. 3.

WAIVER.

See ABSCONDING DEBTOR, 1—ARREST, I. —ATTACHMENT OF GOODS, 3—CERTIORARI, 4—CONTRACT, I. 6—COSTS, VII. 17—EXECUTION, III. 11—INSURANCE, VI. 2 — LANDLORD AND TENANT, IV. 1, VIII. 2—MUNICIPAL CORPORATIONS, VI. 2, XVI. 3—PARTICULARS, I. 2, 3—SALE OF GOODS, VI. 2—SPECIFIC PERFORMANCE, 2—TRIAL, VI. 2 — WAY, V. 2—WRIT OF SUMMONS, V. 3.

WAREHOUSEMEN.

See RAILWAYS AND RAILWAY COMPANIES, III. 4.

WARRANT.

See CRIMINAL LAW, VI. 4—JUSTICE OF THE PEACE, 4, 5—LIQUOR LICENSE ACT, IV. 3.

WARRANTY.

See LIMITATION OF ACTIONS, 14—PRINCIPAL AND SURETY, 2 — SALE OF GOODS, IX. — VENDOR AND PURCHASER, 11.

WATER AND WATERCOURSES.

I. DITCHES AND WATERCOURSES ACT.
II. OTHER CASES.

See CRIMINAL LAW, VII. 11—MUNICIPAL CORPORATIONS, VIII. — RIVERS AND STREAMS.

I. DITCHES AND WATERCOURSES ACT.

1. Award — *Engineer — Appointment—Revocation—Notice—Jurisdiction — Estoppel—Appeal.*]—The defendants' municipal council appointed R. their engineer, in manner provided by the Ditches and Watercourses Act, R. S. O. c. 285, s. 4 (1), in April, 1895, and he accepted the office and acted and continued in it. In 1898 they, without any notice to R., and without any by-law expressly revoking his appointment, passed a by-law purporting to appoint S. as such engineer. In both appointments the form of by-law prescribed by the Act was used; the latter by-law in no way referred to the former or to R.:—*Held*, that the prior appointment had not been revoked; that S. did not become "the engineer;" and that an award purporting to be made by him as such engineer under the Act was invalid:—*Held*, also, even supposing that consent could confer jurisdiction, or that the plaintiffs might waive or be estopped from urging an objection to S.'s jurisdiction, that there was no reasonable evidence of any such consent, waiver, or estoppel; for the plaintiffs' requisition called for "the engineer," and it was the act of the township clerk which called in S. instead of R.; the plaintiffs did not know who was the engineer: they had heard that S. had been appointed, but neither of them knew that R.'s appointment had not been revoked by by-law of which he had had notice. The point was raised upon an appeal against the award and was overruled: but, as it went to the root of the jurisdiction of the whole proceedings, including such appeal, there was nothing in such proceedings which could prevent a consideration of the question now. *Turtle* v. *Township of Euphemia*, 20 Occ. N. 71, 31 O. R. 404.

2. Municipal corporations — "*Owner*"—*Highways.*]—A municipal corporation is an "owner," within the meaning of the Ditches and Watercourses Act, of highways under its jurisdiction, and as such may initiate proceedings under that Act. Where it has, pursuant to an award in proceedings initiated by it under that Act, constructed, without negligence, a drain from a highway to a river through an adjoining owner's land, it is not liable to make compensation under the Municipal Act to that adjoining proprietor on the ground that his land has been injuriously affected by the drain. *In re McLellan and Township of Chinguacousy*, 20 Occ. N. 302, 27 A. R. 355.

II. OTHER CASES.

1. Floatable waters—*Improvements—Joint user — Easement—Estoppel.*]—In a petitory action by the plaintiffs for a declaration of title to a parcel of land

on the bank of a floatable river, with certain water powers appurtenant, and the dams, mill-race, and privileges thereto belonging, free and clear from any servitude or right of co-ownership, it appeared that the proprietor of the land adjoining the plaintiffs' on the lower side had acquired it for manufacturing purposes, and for a number of years had taken his water power through a flume constructed on the river bank in continuation of the plaintiffs' mill-race, which brought the water from the dam to the plaintiffs' mills, and that, in several deeds and written agreements, there had been acknowledgments of the right of owners of the lower lands to use this water subject to the charge of defraying an equal share of the expense of keeping up the constructions incidental to the utilization of the water power, and that both proprietors had, for a number of years, contributed equally towards such expenses:—*Held*, that, whether the rights so recognized constituted a servitude or a right of co-ownership in the lands upon which the constructions had been erected, the plaintiffs had no exclusive right to the enjoyment thereof as against the owner of the lands, although they were absolute owners of the strip of land on which the construction had been made. *Lafrance* v. *Lafontaine*, 19 Occ. N. 376, 30 S. C. R. 20.

2. Flood—*Change in course of stream.*]—When, owing to an extraordinary flood, a stream suddenly changes its course and washes away part of the land of a riparian proprietor, he is entitled, at any time before a prescriptive right, or right by estoppel, to keep the stream in its new channel is acquired against him, to fill in the places washed away and to turn the stream back to its original channel. *County of York* v. *Rolls*, 20 Occ. N. 60, 27 A. R. 72.

3. Timber—*Saw Logs Driving Act—Lieutenant-Governor—Crown.*]—By 60 & 61 Sons, in driving logs down Bear Creek, District of Nipissing, found them stopped by a drive in front belonging to the Imperial Lumber Company, which had reached their destination and were held in the stream until they could be transported to the mill by means of a jack ladder. The logs of C. & Sons were detained so long that they could not be driven further that season, which caused considerable damage, and an arbitration was agreed on under the Saw Logs Driving Act, C. & Sons claiming damage for detention, and the company cross-claiming in respect to jams detaining another drive behind that of C. & Sons. The arbitrator disallowed the company's claim, and awarded C. & Sons some $1,100 for unnecessary and unreasonable detention. In an action on the award the company pleaded that the arbitrator had given compensation for delay caused by the mere fact that their drive was ahead of the other, and the Court of Appeal so held and gave judgment in their favour on the ground that C. & Sons' only remedy was by breaking the jam:—*Held*, reversing the judgment, 26 A. R. 19, 19 Occ. N. 61, that C. & Sons had also a remedy by arbitration under the Act; that the company had not made before the arbitrator the claim raised by the plea; and that they had failed to establish such plea on the trial. *Cockburn* v. *Imperial Lumber Co.*, 19 Occ. N. 374, 30 S. C. R. 80.

WATERWORKS.

See MUNICIPAL CORPORATIONS, XVI.

WAY.

I. CLOSING.
II. DEDICATION.
III. EXTENSION.
IV. MAINTENANCE AND OPENING.
V. NON-REPAIR OF HIGHWAY — INJURY FROM.
VI. NON-REPAIR OF SIDEWALK — INJURY FROM.
VII. OBSTRUCTION.
VIII. PRIVATE WAY.
IX. TOLL-ROAD.

See CROWN, I. 1—EASEMENT, 2—LIMITATION OF ACTIONS, 13 — MUNICIPAL CORPORATIONS, II. 1, IV. 7, X. 2—NEGLIGENCE, 3—RAILWAYS AND RAILWAY COMPANIES — WATER AND WATERCOURSES, I. 2

I. CLOSING.

Road allowance—*Sale — Powers of Lieutenant-Governor—Crown.*]—By 60 & 61 V. c. 28 (D.), s. 20, the Lieutenant-Governor of the North-West Territories in council is empowered to close up "any road allowance or trail which has been transferred to the Territories:"—*Held*, that the words "which has been transferred," etc., qualify "trail" only, and not "road allowance;" and therefore the Lieutenant-Governor in council has power to close *any* road allowance:—*Held*, also, that the power to "deal with" the land composing a road allowance when "closed," "as he sees fit," enables him to transfer and convey a title without any authorization from the Crown other than is contained in s. 20. *In re Sale of Road Allowance*, 20 Occ. N. 146.

II. DEDICATION.

1. Acceptance—*Acquiescence—Time—Statutes.*]—The respondent and another in 1873 bought land in a town, divided it into lots, separated by a certain number of streets, to which they gave names by which the streets continued to be known, and had a plan made and sent to the Crown Lands Commissioner, who transmitted a copy of it to the registrar in order that it might form part of the official cadastre. The streets were afterwards opened by order of the respondent, ditched, fenced, and partly paved. The respondent also acquired a neighbouring piece of land in order to extend these streets to meet neighbouring streets, which was done. He sold lots facing on these streets and in conveying covenanted to leave these streets open in perpetuity:—*Held*, that by these acts the streets were dedicated to the public as public streets.—2. Dedication may result from a unilateral declaration of the owner, and need not be the subject of a regular contract.—3. This dedication was accepted by the public by the user of these streets for fifteen years. It was not necessary that the traffic over them should be the same throughout; it was of little importance that the streets had got into a bad state, the fences and pavements disappeared, and the streets themselves used as pasturage, as long as they remained visible and marked out upon the ground.—4. The acceptance of the dedication resulted also from the fact that the municipal authority had included the streets in their homologated plan, declared final and obligatory by the terms of the charter, and the more so because the respondent, who was then a municipal councillor, had taken part in these proceedings without claiming any right of property in the streets, and that the municipal authority had paved them and put in sewers and water pipes.—5. This dedication and acceptance were not affected by the fact that the officers of the corporation had, by error and without the authority of the corporation, levied some taxes from the respondent upon a small part of these streets, the corporation having brought the amount into Court with their pleading.—6. *Semble*, that the provision of 18 V. c. 100, Art. 40, s. 9, as to possession during ten years of streets by a municipal corporation, should be restricted to roads existing before the 1st July, 1855. *Town of Westmount* v. *Warminton*, Q. R. 9 Q. B. 101.

2. Acceptance—*Altering level—Injury to land — Liability—Damages—Plans—Interest.*]—When the owners of the soil of a private street have offered to give this street for nothing to the city corporation, and the latter has accepted this offer, as well by resolution of its committee and of its council as by works, such as the construction of a sewer and sidewalk, lighting and levelling the soil of the street, executed by the corporation upon the street, and when the street has been opened for public travel, such street becomes a public street, even in the absence of a contract or of its inscription as such in the city registers.—Even if the street was a private street, the city corporation becomes responsible for an overflow of water from which the plaintiff has suffered, when the corporation has altered the condition of the street by raising the level near the property of the plaintiff, and by filling up a ravine by which water formerly flowed away without difficulty, in such a way as to expose the property of the plaintiff to an overflow, especially when the evidence shews that the sewer and the culvert which the city corporation has placed in the street are insufficient in the case of a heavy rain to receive the surface water.—In this case, it being necessary for the purpose of the action and on account of the particular condition of the *locus in quo*, to have a plan made by an expert and a statement of the damages suffered, the plaintiff is entitled to recover as part of his damages the fees of such expert.—Interest upon the amount awarded for damages runs from the date of the judicial demand. *Scanlan* v. *City of Montreal*, Q. R. 17 S. C. 363.

3. Plan — *Municipal corporations—Expenditure.*]—The owners of two adjoining lots agreed between themselves to give twenty feet of each lot to form a street, and a plan of sub-division of the lots shewing a street of this width was filed by them, the consent of the municipality being given by resolution. The line fence was then taken down, and one owner fenced his land so as to leave twenty feet of the lot open to the public, but the other fenced his so as to leave forty feet. Without any by-law or further resolution the municipality did some grading on the sixty feet, and the sixty feet were used by the public for the purpose of a highway:—*Held*, that the giving of forty feet by the one owner did not relieve the other owner from his obligation to give twenty feet, and that he could not, after the expenditure of public money upon it and its user by the public, retract the dedication of the twenty-foot strip. Judgment of Boyd, C., 31 O. R. 499, 20 Occ. N. 101, affirmed. *Pedlow* v. *Town of Renfrew*, 20 Occ. N. 451, 27 A. R. 611.

III. Extension.

1. Expense of widening street — *Contribution of land-owners — Apportionment.*]—*Held*, reversing the judgment in Q. R. 15 S. C. 43, that 57 V. c. 76 (Q.) having enacted that the cost of the expropriation for the widening of Notre-Dame street, in the city of Montreal, should be paid in the proportion of five-eighths by the city of Montreal and of three-eighths by the owners of property abutting on the street, the commissioners should apportion the amount equally upon the two sides of the street, and should not take into account the benefit to the owners by the widening in such a way as to increase the contribution of one side of the street. *Bélanger* v. *City of Montreal*, Q. R. 9 Q. B. 142.

2. Expropriation—*Compensation.*] — The city of Montreal had made and adopted a plan indicating a strip of land belonging to the appellant which was needed for the widening of a street. The respondent asked the city to expropriate in conformity with the plan, and moved back his fence to the new line. The city began expropriation proceedings, and, without waiting longer, the inspector, with the assent of the street commissioner, took possession of the strip in question, laid down the pavement according to the new line, and incorporated the strip into the street. The expropriation proceedings were afterwards abandoned in consequence of a subsequent statute which allowed the city to abandon such proceedings, saving the owners' recourse for damages: —*Held*, that, under the circumstances, the respondent could claim from the city the value of the land of which possession had thus been taken. *City of Montreal* v. *Hogan*, Q. R. 8 Q. B. 534.

IV. Maintenance and Opening.

1. County road—*Local municipalities —Maintenance.*]—A road situated partly in one municipality and partly in another is a county road, even when it extends only a few feet into one of the municipalities.—The county council cannot declare such a road to be local and put it in the charge of the municipality in which the greater part lies, especially when it has not divided the road so as to put under the control of each municipality the part lying therein. *Rocan* v. *Corporation de St. Vincent de Paul*, Q. R. 16 S. C. 379.

2. Location of road—*Statute—Rights under.*] — The town of Longueuil was obliged, by the terms of its charter, to open and maintain during the winter a road upon the river St. Lawrence to communicate with the city of Montreal, the cost thereof to be borne one-half by the city, three-eighths by the county, and one-eighth by the town:—*Held*, that the town alone had the right to localize the road and fix the terminus of it in the city of Montreal. *Town of Longueuil* v. *City of Montreal*, Q. R. 16 S. C. 351.

3. Powers of special superintendent — *Municipal by-law—Uncertainty.*]— A special superintendent has no powers other than those which have been conferred upon him by the council, and everything which he does going beyond the instructions of the council is void.— A by-law which enacts that a road shall be laid out, and maintained in future, at the expense of certain contributories, without saying in what manner it shall be so opened and laid out, is too vague and will be declared illegal. *Piché* v. *County of Portneuf*, Q. R. 17 S. C. 131.

4. Township—*Appeal to county council—Petition for mandamus—Action—Pleading—Amendment—Costs.*]—A petition for a writ of mandamus to force a township corporation to open a road and expend annually a certain sum of money thereon in accordance with a resolution of the county council is sufficient in law, although it does not state that any public notice of the appeal to the county council was given, where it does not appear that the respondent had acquiesced in the appeal to the county council, and had been represented for that purpose and heard on the merits thereof. —If a municipal corporation has seven years to open and complete a road, and is bound to expend thereon a certain sum annually, an action may be taken to compel it to do so after one year. —In such case it is not necessary for the plaintiff to allege that the sum would be sufficient, if expended, to pay any indemnity which might be payable for land damages in connection with the road.—If a party moves to amend his pleading after an inscription in law has been made, and the party inscribing persists in his inscription, for reasons not covered by the amendment and afterwards held to be unfounded, no costs will be granted either on the inscription in law or on the motion to amend. *Young* v. *Township of Hereford*, 2 Q. P. R. 481.

V. Non-repair of Highway — Injury from.

1. Children playing in street — *Lord Campbell's Act — Damages.*]—Children are entitled to play upon highways where there is no prohibitory local law, and where their presence is not prejudicial to the ordinary user for traffic and

passage, and municipal corporations are bound to keep them in repair, and are responsible for damages sustained by any person by reason of default in so doing. Constitution and characteristics of highways and streets in England and Canada compared. In an action under Lord Campbell's Act by a parent for the death of his child by the negligence of the defendant, it is not necessary to shew that any pecuniary benefit has been actually received; but such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages, is sufficient. Judgment in 31 O. R. 180, 19 Occ. N. 390, reversed. *Ricketts* v. *Village of Markdale*, 20 Occ. N. 115, 31 O. R. 610.

2. Notice of accident — *Joint liability—Waiver.*]—The notice of the accident and the cause thereof required by s. 606 (3) of the Municipal Act, R. S. O. c. 223, must now, by 62 V. c. 25, s. 39, be given to each of the municipalities where the claim is against two or more as jointly responsible for the repair of the road. *Leizert* v. *Township of Matilda*, 26 A. R. 1, not now applicable. Where notice in writing was given to one township municipality of two sued as jointly liable, but not to the other, it appeared that the reeve of the latter had been verbally notified by the plaintiff, and had then promised to write and had written to the reeve of the former, after which both reeves attended with the plaintiff and examined the place of the accident, and the reeve of the latter afterwards wrote to the plaintiff advising him that the township corporation did not recognize his claim because it was considered that the loss arose from the fault of the plaintiff; and all this within thirty days after the accident: — *Held*, that there was no waiver. *Jones* v. *Township of Stephenson*, 20 Occ. N. 452, 32 O. R. 226.

3. Obstruction — *Negligence — Damages.*]—A milk-stand built on a highway by an adjoining proprietor, and projecting slightly over the travelled way, is such an obstruction as to constitute want of repair within the meaning of the Municipal Act, and when such an obstruction exists for three years, and the municipal corporation having jurisdiction over the road in question take no steps to have it removed, they are liable in damages for an accident caused by it. *Castor* v. *Township of Uxbridge*, 39 U. C. R. 113, considered and approved. Quantum of damages for death of a child discussed. *Huffman* v. *Township of Bayham*, *Tanner* v. *Township of Bayham*, 19 Occ. N. 383. 26 A. R. 514.

4. Obstruction—*Telephone company — Indemnity.*] — Under its Acts of incorporation the Bell Telephone Company is authorized, with the consent of the municipal council interested, and under the supervision of the engineer of the municipality, or of such other officer as the municipal council may appoint, to erect and maintain poles along the sides of any street, but so as not to interfere with the public right of travelling on and using the street. Under an agreement with the municipal council of the defendants, the company erected a line of poles in one of the streets of the city, one pole being placed in the travelled portion of the street. The defendants had no engineer, and did not appoint any officer to supervise the erection of the poles, but there was some evidence that the work had been done under the supervision of an officer of the defendants known as the "street surveyor," who discharged the duties usually discharged by an engineer of a municipality. The pole was allowed to remain in the street for several years, and the plaintiffs were injured by coming into collision with it, while lawfully using the street:—*Held*, affirming the judgment of Ferguson, J., 29 O. R. 518, 18 Occ. N. 310, that the pole was an illegal obstruction in the highway, which was therefore out of repair within the meaning of the Municipal Act, and that the defendants, having neglected to remove it, were liable in damages:—*Held*, also, reversing the judgment on this point, that the pole had not been erected under the supervision of the proper officer, and that the defendants were entitled to indemnity from the Bell Telephone Company. *Atkinson* v. *City of Chatham*, 19 Occ. N. 382, 26 A. R. 521.

5. Uneven surface—*Liability—Objection—Waiver.*]—Action for damages for injury to a horse claimed to have been occasioned by non-repair of a highway. The non-repair consisted in the continued existence of a series of hollows, styled pitch holes, produced by traffic in the snow-covered surface of a travelled road; the holes were in almost uninterrupted succession, at intervals of only a few feet, varying in depth from one to four feet below the level of the travelled snow-road. The descent and ascent of the pitch holes were so steep and their depth so great as to make travel, especially with loads, extremely difficult and even unsafe. A small expenditure of municipal moneys would have so mitigated the evil as to render the travel safe:—*Held*, that under s. 618 of the Municipal Act, R. S. M. c. 100, the defendants were liable for the damages. *Caswell* v. *St. Mary's Road Co.*, 28 U. C. R. 247, and *Walker* v. *City of Halifax*,

16 N. S. Reps. 371, Cass. Dig. 175, followed. *Held*, also, following *Proctor* v. *Parker*, 12 Man. L. R. 529, that, by not raising the objection at the trial, the defendants had waived strict proof of the facts which, under s. 619, would render them liable to keep the road in repair. *Kennedy* v. *Rural Municipality of Portage la Prairie*, 20 Occ. N. 26, 12 Man. L. R. 634.

VI. NON-REPAIR OF SIDEWALK—INJURY FROM.

1. Notice of non-repair — *Duration of time—Negligence.*]—Where the evidence shews that a sidewalk in a municipality had been in a bad and dangerous condition for a period of time anterior to the accident sufficient to allow the municipal authorities to put it in a safe and proper state, the facts establish negligence on their part, for the consequences of which the corporation is responsible. *Gaffney* v. *City of Montreal*, Q. R. 16 S. C. 260.

2. Obstruction — *Trap-door—Continuing nuisance created by another.*] — The owner of a house abutting on a highway placed without authority a trap-door in the sidewalk in order to obtain an entrance to his cellar, the hinges of the trap-door projecting about an inch above the sidewalk. The defendant obtained title from this owner, and continued to use the trap-door, and the plaintiff, while lawfully using the highway, stumbled against the hinges and was hurt: — *Held*, that the defendant could not be held to be continuing the nuisance, as she had no title to the highway and no right, strictly speaking, to remove the trap-door constructed by another, and that, as the accident was not caused during or by her user of the trap-door, she was not liable. *Ewing* v. *Hewitt*, 20 Occ. N. 202, 27 A. R. 296.

3. Prescription—*Former action — Reservation.*] — The plaintiff sued a city corporation in the Circuit Court claiming $50 as damages for injuries sustained by a fall, and obtained a judgment for $30, without recourse for future damages, his action not admitting of any such reservation. Afterwards, alleging that the injury which she had sustained was incurable and rendered her incapable of working, which she did not know at the time of her first action, the plaintiff proceeded again against the corporation for $1,000 damages. This action was begun more than six months after the accident, and was not preceded by a notice given within thirty days after the accident: — *Held*, that, under these circumstances, the action was barred by the six months' prescription. *Chartrand* v. *City of Montreal*, Q. R. 17 S. C. 143.

4. Snow and ice.]—The Municipal Ordinance gives municipalities in the Territories jurisdiction over roads, casts upon them the duty of maintaining them, authorizes them to abate nuisances, and affords them means for raising money for corporate purposes:—*Held*, therefore, that where a municipality had constructed a sidewalk upon one of the roads within its limits, upon which snow and ice had accumulated, which it had not removed within a reasonable time, in consequence of which the plaintiff slipped and fell and was injured, the municipality was liable. *Cuzner* v. *Town of Calgary*, 1 Terr. L. R. 162.

5. Snow and ice—*"Gross negligence."*] —"Gross negligence," in s. 606 (2) of the Municipal Act, R. S. O. c. 223, means at the least "great negligence," and when it is attempted to make a municipal corporation responsible in damages under that sub-section for an accident caused by ice on a sidewalk, it must be shewn that the sidewalk was allowed to remain in a dangerous condition for an unreasonable time. If the sidewalk has been constructed in accordance with the plans of competent engineers and is in good repair, the possibility of an improved or less dangerous plan of construction is not an element to be considered in deciding the question of the municipality's gross negligence. Where there was a sudden change in temperature about six in the morning, and ice then formed on the sidewalk in question, it was held that the municipality, in the absence of actual notice of its dangerous condition, were not liable in damages for an accident which happened about eleven o'clock on the same morning. *Ince* v. *City of Toronto*, 20 Occ. N. 300, 27 A. R. 410.

6. Snow and ice — *Negligence—Notice—Contributory negligence.*]—To render a municipal corporation liable for the bad condition of a sidewalk, it is necessary that the condition should have existed for a sufficient time to warrant the presumption that the corporation knew of it, especially when it is a sidewalk usually kept in good order, upon which ice has formed in a short time after a sudden thaw.—A person who sees before him a sidewalk covered with sheer ice, and neglects to turn aside a few steps in order not to lose time, cannot complain if he falls. *Gunlack* v. *City of Montreal*, Q. R. 17 S. C. R. 294.

7. Snow and ice—*Negligence—Notice of accident—Sufficiency of.*]—This was an action to recover damages for injuries alleged to have been sustained by the plaintiff owing to his slipping on a quantity of snow and ice in a street in the town of St. Mary's, which the defendants were alleged to have negligently allowed to accumulate. The statutory notice required by R. S. O. c. 223, s. 606, s.-s. 3, given on behalf of the plaintiff, described it as having taken place opposite to a certain shop, whereas, in fact, it took place opposite a different shop, about twenty feet farther on the same side of the street:—*Held*, that the notice was sufficient, as it gave information enough to enable the corporation to investigate, and that is all that can be called for. *McQuillan* v. *Town of St. Mary's*, 20 Occ. N. 42, 31 O. R. 401.

8. Snow and ice—*Reasonable precautions.*]—A town corporation is liable in damages only for such accidents on streets as arise from its neglect and want of care; and where it is established that the corporation had adopted all reasonable and necessary precautions to maintain the sidewalks in good order and condition, and that the accident complained of occurred partly through the imprudence of the injured person and partly through extreme and uncontrollable climatic conditions, the corporation will be relieved from responsibility. *Olive* v. *Town of Westmount*, Q. R. 16 S. C. 426.

VII. Obstruction.

1. Dwelling house — *Survey—Lowering grade—Compensation.*]—A survey of the town of Cornwall was confirmed by 47 V. c. 50 (O.). This Act declared the survey to lay down correctly the lines of the street as originally laid out, and provided that:—"Where any dwelling house or shop * * * had been before the 1st January, 1888, partly built upon any street as ascertained by said survey, it shall not be incumbent upon the owner or occupant of such dwelling house, shop, or building to remove the same off such street until the rebuilding of such dwelling house, shop, or building, or the repairing thereof to the extent of 50 per cent. of the then cash value thereof; but this proviso shall not apply to any fence, steps, platform, sign, porch, or projection attached to any such dwelling house or shop." The survey shewed that a certain dwelling encroached four feet upon the street, and that the verandah attached to it encroached three feet six inches further upon the street. This verandah was made of wood, rested on stone pillars, had its own roof, and was firmly attached to the house: — *Held*, that the verandah was an integral part of the dwelling house and not a porch or projection attached to it, and was not to be considered an obstruction on the street which should be removed, within the above proviso:—*Held*, therefore, that the position of the dwelling house and verandah did not bar the owner from applying for compensation under the Municipal Act for damages sustained by reason of the corporation having lowered the grade of the street in front to an extent interfering with his access. *Williams* v. *Town of Cornwall*, 20 Occ. N. 457.

2. Verandah—*Municipal by-law — Injunction.*]—In an action to restrain the defendants from enforcing a by-law to compel the plaintiff to remove a verandah projecting some distance over one of the streets of the town, it was held, on the evidence, that the verandah had been built after the street had been dedicated and laid out, and that it was therefore an unlawful obstruction; but, as it had been in existence for a great many years, and as no special necessity for its removal was made out, the Court refused to grant the defendants a mandatory injunction against the plaintiff for its removal, leaving them to enforce their by-law in such way as they should be advised. *Caldwell* v. *Town of Galt*, 20 Occ. N. 203, 27 A. R. 162.

VIII. Private Way.

1. Enclave—*Servitude—Parties to action.*]—The plaintiff, who was the owner of a farm lot abutting upon the rear of the defendant's property, and without communication with any highway, complained that he had been prevented from exercising the legal servitude of passage to which the defendant's property was subject in favour of the plaintiff's. He asked that the servitude be located, and prayed that it be located on the defendant's farm road:—*Held*, that the legal servitude of passage in favour of the owner of a property *enclavée* over the neighbour's property, to gain access to a highway, exists upon the shortest line which communicates from the nearest highway to any part of the property *enclavée*, unless upon this line serious obstacles exist which would render the cost of constructing and using the road very onerous, in which case the servitude would lie over the shortest road which would avoid such obstacles. 2. No part of the property *enclavée* can be counted in computing the distance to a highway, which distance would be measured from any point of

the property *enclavée* to the nearest highway. 3. Even where a servitude of passage is held to exist, the person whose land is subject to it is not obliged to permit the person exercising it common use with himself of his farm road,—the situation of the servitude depending upon the natural conditions of the several properties, and not upon the works which the surrounding proprietors may make. 4. In case of doubt as to the locating of the servitude, the plaintiff ought to make the various persons interested parties, so that the location of the servitude may be ascertained by experts. It is not the duty of the defendant to bring these parties into the cause. *Boyer* v. *Perras*, Q. R. 17 S. C. 522.

2. Obstruction — *Grant—Conditions.*] —The parties were owners of adjoining lots bounded in the rear by a lane. Their common grantor had divided his land into eight lots, leaving the lane in the rear of them. He had afterwards sold lots 1, 2, 3, 4 to the immediate grantor of the defendant and lot 5 to the immediate grantor of the plaintiffs, "with the right of way over this lane in common with every person to whom J. W. has granted or shall afterwards grant the right of way over the said lane, without obstructing it at any time, nor depositing filth or snow, and in case of its being deposited, to remove such filth or snow so that the said lane may be clean." On the side of the defendant's land the lane had no opening into the public highway, but on the plaintiffs' side it opened on a public street. The defendant built a stable upon the lane in rear of his land, and the plaintiffs asked that it should be removed:—*Held*, that, in virtue of their title, the plaintiffs had a right of way over the whole extent of the lane, and not only over the part which they could use as a means of access to the public highway, and the defendant could not obstruct the lane in rear of their property, although, on that side, the lane had no means of exit. Removal ordered. *Germain* v. *Pigeon*, Q. R. 16 S. C. 235.

IX. Toll-Road.

Syndics — *Control—Notice—Repair and maintenance.*] — The statute 4 V. c. 17 leaves it to the discretion of the syndics of toll-roads to take the control of the roads there mentioned, or of sections or parts thereof; and it is only after they have assumed such control, giving the notice there required in the manner there pointed out, that the road authorities cease to be bound to maintain and repair such roads.—Without a previous taking possession in the manner provided by the statute, or by force of the execution of a judgment ordering them to do so, the syndics cannot be bound to repair and maintain a road of which they have not assumed the control. *Roy* v. *Les Syndics des Chemins à Barrières de la Rive Nord*, Q. R. 16 S. C. 615.

WILL.

I. Construction.
II. Widow's Election.
III. Other Cases.

See Costs, II., III. 9 — Execution, III. 6—Gift, 3—Infant, II. 1—Insurance, V. 3—Limitation of Actions, 1.

I. Construction.

1. Annuity — *Interest on fund—Corpus.*]—A testator by his will directed his executors "to take as much of my estate and moneys to be put to interest as will make $200 of interest per year, said amount of $200 to be paid to my beloved wife * * * each and every year of her life, said $200 to be paid by my executors to my beloved wife on the 1st day of January next after my decease, and every subsequent payment to be paid on the 1st day of January in each and every year thereafter. * * * At the death of my said wife said principal to be equally divided between my brothers." There were specific devises of some real estate and chattels, and the residue was not sufficient to produce $200 a year:—*Held*, that the widow was entitled to $200 a year, and that the corpus of the estate could be resorted to, if necessary, for that purpose. *Kimball* v. *Cooney*, 20 Occ. N. 346, 27 A. R. 453.

2. Codicil — *Testamentary succession—"Heirs" — Universal legatee.*] — R. A., who died in Montreal in 1896, had, by his will, made there in 1890, bequeathed to M. A. and her heirs, one-fourth of his residuary estate. M. A. died in 1895, leaving a will appointing five of her children her universal legatees. R. A. subsequently took communication of the will of the deceased M. A., and made a codicil to his own will in the terms following:—"With respect to the share of the residue of my property which I bequeathed by my will to my sister, the late M. A., * * * my will and desire is that her said share of said residue shall go to her heirs:"—*Held*, Gwynne and Girouard, JJ., dissenting, that, under the provisions of the Civil Code of Lower

Canada, the words "her heirs" in the codicil must be construed as meaning the persons to whom the succession of M. A. devolved as universal legatees under her will. Judgment in Q. R. 9 Q. B. 257 reversed. *Allen* v. *Evans*, 20 Occ. N. 371, 30 S. C. R. 416.

3. Contingent or vested interest —*Legacy.*] — A testator devised certain property to trustees to hold it in trust for twenty years after his decease; during that time to pay the income to his widow and children, naming them, in certain shares; and after the expiration of twenty years to sell and to divide the proceeds among his "said children" in certain shares. He also devised certain other property to the trustees upon trust to sell from time to time as they in the exercise of "full discretion" should think fit, and to pay the income to his widow for life, and upon her decease to divide the corpus among his children, naming them, in certain shares: —*Held*, that the children took vested interests. *Kirby* v. *Bangs*, 20 Occ. N. 61, 27 A. R. 17.

4. Devise over—*Condition—Estate.*]—A testator devised all her real and personal estate to her son in fee and provided in case the son should die without issue previous to the death of her brother and sister, that they should take certain interests. The sister died in the lifetime of the son :—*Held*, that, as the event, the death of the son previous to the death of both the brother and sister, could not happen, the son took an estate in fee simple. *Lillie* v. *Willis*, 20 Occ. N. 14, 31 O. R. 198.

5. Devise of residue—*Executory devise — Event happening in part.*]—A testator by his will gave his wife a life interest in his estate, directed payment at her death of some specific legacies, and then provided: "The residue * * * I give, devise, and bequeath as follows, that is to say: it shall be equally divided between my brothers R. M. and M. M., or in case of their dying before my * * * wife L. M., it shall be equally divided between the heirs of my brothers R. M. and M. M." R. M. died in the lifetime of the widow, and M. M. survived her :—*Held*, that, as the event provided for, viz., the death of both R. M. and M. M. during the widow's lifetime, had not happened, the devise of the residue to R. M. and M. M. was not divested, and R. M.'s widow took his share under his will. *In re Metcalfe —Metcalfe* v. *Metcalfe*, 20 Occ. N. 381, 32 O. R. 103.

6. Gift to niece or heirs—*Predecease of niece.*]—A testator, by his will, after a provision in favour of his wife for life, directed that at the death of his wife any money that might then be remaining should be equally divided and paid to two nephews and two nieces, naming them, or their heirs, executors, or assigns. One of the nieces predeceased the testator, having a husband and children :—*Held*, that the gift to the deceased niece did not lapse, and that her heirs were entitled to her share, and that her heirs were those who would have taken her personal property under the Statute of Distributions in case of her dying intestate possessed of personal property. *In re Wrigley*, 20 Occ. N. 387, 32 O. R. 108.

7. Inconsistent clauses — *Executory devise—Failure of issue—Estate in fee.*]—A testator, by the third clause of his will, devised a lot of land to a son, "his heirs and assigns forever," and in the fourth clause stated it to be "my will and desire, provided my (said) son shall have no lawful heir or children, that the above mentioned tract of land, after his death, that (the plaintiff) shall have it with all the right and title that my (said) son had to it heretofore." By the fifth clause he gave to his wife "the use" of half the lot "during life; after her decease my will is that the same shall belong to my (said) son, his heirs and assigns forever." The son died after the testator without having had any children :—*Held*, that the fifth clause removed from the operation of the third and fourth clauses one-half of the lot, which vested in the son subject to the mother's life estate, while as to the other half the son had under the third clause an estate in fee simple, subject under the fourth clause to an executory devise over in favour of the plaintiff, which, in the events which had happened, had taken effect. Judgment in 30 O. R. 627, 19 Occ. N. 227, affirmed. *McMillan* v. *McMillan*, 20 Occ. N. 199, 27 A. R. 209.

8. Legacy — *Survivorship—Accruer.*]—A testator gave a legacy of $500 to each of three grandchildren, and directed "the said moneys so bequeathed to be kept invested by my executors, and the same with accrued interest to be paid over to the said William and Thomas on their attaining their majority, and the said legacy to my said granddaughter to be paid to her with the interest accrued thereon on her attaining her majority or on her marriage, whichever event shall first happen. In case of the death of any one of my said grandchildren, the bequests and legacies to them in this my will contained shall be divided among and go to the survivor or survivors of them share and share alike." One of the grandsons died under age and unmarried,

and then the granddaughter died under age and unmarried.—The other grandson attained his majority, and the executor paid him the whole amount of the legacies. In an action by the personal representative of the granddaughter seeking payment by the executor of half of the legacy given to the grandson who died first and the accumulations thereon :—*Held*, that the share of the deceased grandson's legacy which accrued to the granddaughter on his death passed on her death to the surviving grandson, and that the plaintiff was not entitled to it. *Clifton* v. *Crawford*, 20 Occ. N. 301, 27 A. R. 315.

9. Powers of executors—*Promissory note—Advancing legatee's share.*] — M. by his will gave a special direction for the winding up of his business and the division of his estate among a number of his children as legatees, and gave to his executors, among other powers, the power "to make, sign, and indorse all notes that might be required to settle and liquidate the affairs of his succession." By a subsequent clause in his will he gave his executors "all necessary right and powers at any time to pay to any of his said children over the age of thirty years, the whole or any part of their share in his said estate for their assistance, either in establishment, or, in case of need, the whole, according to the discretion, prudence, and wisdom of said executors," etc. In an action against the executors to recover the amount of promissory notes given by the executors, and discounted by them as such in order to secure a loan of money for the purpose of advancing the amount of his legacy to one of the children who was in need of funds to pay personal debts :—*Held*, that the two clauses of the will referred to were separate and distinct provisions which could not be construed together as giving power to the executors to raise the loan upon promissory notes for the purpose of advancing the share of one of the beneficiaries under the will. *Banque Jacques-Cartier* v. *Gratton*, 20 Occ. N. 271, 30 S. C. R. 317.

10. Substitution — *Annuity—Accumulations.*]—A testator set apart a fund as a provision for his wife, and also for his children until majority or marriage. He gave the residue of his estate to his children living at his death, and directed that it should be divided on the death of all of them. He further directed that from majority or marriage each child was to receive the revenue derivable from his share, limited to $6,000 a year, each child being charged with a substitution in favour of his or her children :—*Held*, that the annuity of each child was a charge on the revenue of his own share and its arrears, not on the total revenue of the estate.—2. That each child was entitled from the testator's death to an equal share of the net revenue current and accumulated, without regard to the benefits which during minority he received from the fund set apart or under other clauses of the will. — 3. That the substitution was confined to the share of each child in the capital of the residue, and did not extend to the accumulation of its revenue. *Beaudry* v. *Barbeau*, [1900] A. C. 569.

See ESTATE.

II. WIDOW'S ELECTION.

1. Annuity — *Separation deed.*] — A husband in a separation deed covenanted to pay his wife an annuity of $200 in half-yearly payments, and charged it on certain land; the wife accepting it in full satisfaction for support, maintenance, and alimony during coverture, and of all dower in his lands then or thereafter possessed. The husband, by his will, subsequently executed, directed his executors to pay his wife $400 annually, $200 on the 1st June and December in each year during his life, and added: "which provision in favour of my said wife is made in lieu of dower:"—*Held*, that the wife was not put to her election between the benefits under the deed and the will, but was entitled to both. *Carscallen* v. *Wallbridge*, 20 Occ. N. 383, 32 O. R. 114.

2. Specific bequest — *Dower.*]—An estate consisting of realty and personalty amounting to over $10,000 was, after a direction to pay debts and funeral and testamentary expenses, and after a specific devise of certain land, devised by the testator to his executors in trust to sell and convert into money, and out of the proceeds to pay to his widow $3,000 for her own use absolutely, and to divide the remainder among certain nephews and nieces:—*Held*, that the widow was not put to her election, but was entitled to her dower in addition to the bequest. *Amsden* v. *Kyle*, 9 O. R. 439, distinguished. *In re Schunk*, 19 Occ. N. 361, 31 O. R. 175.

III. OTHER CASES.

1. Action to set aside — *Administrator pendente lite — Foreign Court—Possession.*]—A person who has been appointed by a French Court provisional administrator pending a suit to set aside a will, the estate being situated in France, cannot claim, against a sequestrator appointed by a Court of the

Province of Quebec, possession of the property of the estate situated in that Province.—The Courts of the Province of Quebec have full power to decide as to the provisional possession of real and personal property situated in this Province of a person who died abroad, and their decisions are absolute in this country.—Art. 80, C. P. C., does not apply to the provisional administrator or sequestrator of the property of an estate pending a suit to set aside a will, inasmuch as he does not represent, in any sense, the deceased. *Lavoignat* v. *MacKay*, Q. R. 17 S. C. 378.

2. Bequest — *Condition—Restraint of religious liberty—Public policy.*]—R. died in 1878, leaving a will by which the usufruct of his estate was given to his widow for life, and afterwards to his children for their lives, and the estate then to be divided amongst his grandchildren, whom he instituted his universal legatees. A clause in the will provided that if any of his sons should marry otherwise than according to the rites of the Roman Catholic church, the issue of such marriage should be excluded from the succession, as should also any grandchildren who were not brought up and instructed in that faith. See Art. 760, C. C. — *Held*, following *Kimpton* v. *Kimpton*, 16 Rev. Leg. 361, that the condition was void, being in restraint of religious liberty, and therefore contrary to public policy. *Hodgson* v. *Halford*, 11 Ch. D. 959, being a case under the English law on the subject, not applicable in the Province of Quebec. *Renaud* v. *Lamothe*, 20 Occ. N. 443.

3. Power to sell land—*Reinvestment—Substitution — Family council—Order of Judge.*]—Under a will creating substitution, the institute had power to dispose of immovables belonging to the substitution, subject to the obligation of reinvesting the proceeds in other immovables. The institute was represented by a curatrix. The question specially submitted to the Court was whether the curatrix to the institute required the authorization of a family council as to the reinvestment to be made of the price of an immovable belonging to the substitution, which had been sold under the power conferred by the will :—*Held* (affirming the judgment in Q. R. 13 S. C. 516), that the law does not require the authorization of a family council for the reinvestment by the institute of the proceeds of an immovable sold; all that is necessary is that the institute give notice to the substitutes if they are of age, or to the curator to the substitution, and, on their or his refusal to consent, obtain the authorization of a Judge. *Daly* v. *Amherst Park Land Co.*, Q. R. 16 S. C. 570.

4. Substitution—*Payment of debts—Alienation of estate.*]—Land subject to substitution cannot be alienated in a definite way except in the cases expressly mentioned in Art. 953, C. C., and in the manner there indicated.—It cannot be alienated at will, even for the purpose of paying the debts of the entailing grantor, unless he has expressed a wish to that effect.—When a testator, after having provided for payment of his debts, leaves what remains of his property burdened with a substitution, he is considered to have permitted indefinitely the alienation of his property to the extent of what is necessary to pay such debts. *Choquette* v. *Masson*, Q. R. 16 S. C. 606.

5. Testament authentique—*Irregularity—Validity by English law—Pleading.*]—In an action based upon a *testament authentique*, if the defendant pleads that it is invalid as a *testament authentique* because certain formalities have not been observed, the plaintiff may reply that the will is valid as complying with the requirements of a will according to the form derived from the law of England. *Le Séminaire de Rimouski* v. *Joncas*, 3 Q. P. R. 256.

WINDING-UP.

See COMPANY, II.

WITNESSES.

Jew—*Form of oath.*]—A witness at a trial, who professes the Jewish religion, but is sworn on the Evangelists, and without placing his hat on his head, will be sworn anew by order of the Court when his religious belief is ascertained by counsel, notwithstanding the fact that the witness declares himself bound by the oath already taken. *Sessenwein* v. *Palmer*, 3 Q. P. R. 110.

See COSTS, VII. 16, 17, 18—EVIDENCE, IV., VII. 3—LIQUOR LICENSE ACT, I.—TRIAL, III.

WORDS.

"Absence beyond seas."—See JUDGMENT, II. 2.

"At."—See CONTRACT, III. 1.

"Blackmailing."—See DEFAMATION, 7.

"Cause as aforesaid."—See PATENT FOR INVENTION, 5.

"Costs in the cause."—See COSTS, II. 2, 3.

"Debt."—See WRIT OF SUMMONS, VI. 1.

"Debtor." — See MECHANICS' LIENS, III. 1.

"Disposing of."—See LANDLORD AND TENANT, VIII. 1.

"Exists."—See PATENT FOR INVENTION, 3.

"Foreign patent."—See PATENT FOR INVENTION, 3.

"Forfeit and pay."—See JUSTICE OF THE PEACE, 1.

"Gross negligence."—See WAY, VI. 5.

"Heirs."—See WILL, I. 2.

"Intrusted." — See PRINCIPAL AND AGENT, 2.

"Notice in writing."—See MECHANICS' LIENS, II. 1.

"Opposite party." — See RAILWAYS AND RAILWAY COMPANIES, V. 1.

"Owner." — See MECHANICS' LIENS, II. 2—SHIP, 5 — WATER AND WATERCOURSES, I. 2.

"Practising." — See MEDICAL PRACTITIONER—SOLICITOR, IV.

"Selling or offering for sale."—See MUNICIPAL CORPORATIONS, XV. 3.

"Triple costs."—See COSTS, IX. 12.

WORKMEN'S COMPENSATION FOR INJURIES ACT, ONTARIO.

See MASTER AND SERVANT, VI.

WRIT OF ERROR.

See CRIMINAL LAW, X.

WRIT OF POSSESSION.

See EXECUTION, III. 23.

WRIT OF SUMMONS.

I. AMENDMENT.
II. COPY.
III. SERVICE—IRREGULARITY.
IV. SERVICE OUT OF JURISDICTION.
V. SERVICE—SUBSTITUTED.
VI. SMALL DEBT PROCEDURE, N.W.T.

See JUDGMENT, I. 1, 3, II. 2, IV. 4—MUNICIPAL ELECTIONS, I. 6, 12—PEREMPTION, 6—SHIP, 8—VENUE, 4.

I. AMENDMENT.

Misnomer—*Terms.*] — The writ was in the Form "A" in schedule to 60 V. c. 28 (N.B.), except that the name "R. L." instead of that of the plaintiff was inserted in the clause, "and take notice that in default of your so doing the said R. L. may proceed thereon to judgment and execution." The defendant did not appear. After the issue of a writ of inquiry, the defendant moved to set aside the writ and all subsequent proceedings on account of this error. The Judge acceded to the motion, refusing leave to amend, applied for under the provisions of s. 66 of the Act, holding that the writ was a nullity:—*Held*, that the error was an irregularity, and leave to amend should have been granted. *Stewart* v. *Canadian Pacific R. W. Co.*, 20 Occ. N. 88.

II. COPY.

1. Uncertified copy — *Appearance.*]—The fact that the copy of a writ of summons has not been certified as true by the prothonotary or the attorney of the plaintiff is not a ground for an *exception à la forme*, if the defendant has appeared in the time allowed and has not suffered any prejudice in consequence. *Bélanger* v. *Brais*, 2 Q. P. R. 425.

2. Variance—*Name of attorney.*]—An action will not be dismissed upon exception to the form because it appears by indorsement on the writ that it was issued on the praecipe of one advocate while the copy of it is certified by another advocate, who is the true attorney for the plaintiff. *Boulet* v. *Cantin*, 3 Q. P. R. 252.

See III. 2.

III. SERVICE—IRREGULARITY.

1. Account accompanying writ.]—An exception to the form based upon the fact that no copy of the account sued upon was served upon the defendant at the same time as process in the action, will be dismissed, if it appears that a copy of the account was served upon the defendant between the service and the return of the writ. *Murphy* v. *Simpson*, 2 Q. P. R. 556.

2. Declaration — *Certified copy.*] — The copy of the writ and declaration is one and the same document, which, therefore, requires only one and the same attestation. Thus, the service is not void by reason of the fact that the

copy of the writ left with the defendant is not certified to be a true copy, if the declaration is so certified. *United Counties R. W. Co.* v. *Sisters of the Precious Blood*, Q. R. 8 Q. B. 406.

3. Nullity — *Leave to re-serve.*]—The service of the writ of summons and declaration being void by reason of the disqualification of the person effecting it, permission to re-serve—the writ being still in force—will be granted on conditions imposed by the Court. *Marsolais* v. *Grenier*, 3 Q. P. R. 142.

4. Service on stranger. — *Dismissal of action.*]—If the copy of the writ of summons is left with a person who is a complete stranger to the defendant and has no authority to receive the writ for him and this in a house which is neither the residence of the defendant, nor his domicil, nor his office, nor the place where he boards, the action will be dismissed upon *exception to the form*. *Lapointe* v. *St. Onge*, 3 Q. P. R. 68.

IV. SERVICE OUT OF JURISDICTION.

1. Affidavit — *Order.*] — An affidavit leading to an order for an *ex juris* writ should shew the grounds on which the deponent believes that the plaintiff has a good cause of action. *Northern Counties Investment Trust (Ltd.)* v. *Nathan*, 7 Brit. Col. L. R. 136.

2. Cause of action—*Agreement—Place of performance.*]—An *ex juris* writ having been issued to enforce an agreement between residents of British Columbia and England for transfer of shares in a Provincial company, not in terms providing for its performance within the jurisdiction:—*Held*, that the writ should be set aside. *Oppenheimer* v. *Sperling*, 7 Brit. Col. L. R. 96.

3. Order allowing — *Jurisdiction of local Judge — Affidavit — Setting aside order.*] — A local Judge of the Supreme Court has jurisdiction to make an order for an *ex juris* writ. The affidavit leading to the writ should be reasonably precise as to the essential facts alleged to constitute the cause of action, and if there are omissions of substance, the order should not be made. A Supreme Court Judge has power on motion to set aside an *ultra vires* order made by a Judge of limited jurisdiction. *Tate* v. *Hennessey*, 20 Occ. N. 343, 7 Brit. Col. L. R. 262.

4. Regularity — *Order — Amendment — English forms.*]—A writ of summons was issued in the form of a writ for service within the jurisdiction, in which the time for appearance was that fixed in such cases, and in which the defendant was stated to be a resident of the judicial district wherein the writ was issued. It appeared that the defendant was not in fact at the time within the Territories, but that, for portions of each of several years previous, he had resided within the said judicial district: —*Held*, following *Fry* v. *Moore*, 23 Q. B. D. 395, that the writ was not irregular. Subsequently an order was made giving the plaintiff leave to serve the said writ on the defendant out of the jurisdiction and extending the time therein fixed for appearance; but the order did not expressly amend or authorize the amendment of the writ:—*Held*, as to the objection that a concurrent writ for service *ex juris* should have been issued, or that the original writ should have been amended, that the Judge's order should be looked upon as involving an exercise of the powers given by E. M. R. 1037, and also as a constructive amendment of the writ. None of the British forms of writs of summons are introduced into the Territorial practice. *Semble*, that the one form provided by the Judicature Ordinance is adaptable even to the case of foreign defendants *ex juris*, inasmuch as it is in effect a notice, not a command. On an application for leave to serve a writ out of the jurisdiction the plaintiff need shew only a *prima facie* case within the provisions of the Ordinance. *Moore* v. *Martin*, 1 Terr. L. R. 236. See also *S. C.*, 18 S. C. R. 634.

See DISCOVERY, III. 2.

V. SERVICE—SUBSTITUTED.

1. Evasion.] — Where it appears by the return of the bailiff that the doors of the defendant's domicil are locked and barred, and that no reply is made to calls to open, the Judge may, under Art. 146, C. C. P., permit service to be effected by depositing copies at the door of defendant's domicil, after first ringing the bell and calling upon the occupant to permit him to enter and make service in the usual manner. *Marlatt* v. *Lynn*, Q. R. 17 S. C. 128.

2. Foreign company — *Agent.*]—A person who sells goods on commission for a foreign company, and who keeps samples in his office or carries them to customers whose orders he takes, these orders being filled by the company sending the goods directly to the customers, is not the agent of such company, within the meaning of Arts. 140-142, C. C. P., so as to authorize the

service upon him of process in an action against the company. *Macdougall* v. *Schofield Woollen Co.*, Q. R. 16 S. C. 411.

3. Foreign company — *Waiver—Appearance.*]—Service of process must be, if possible, personal, or, in the case of a corporation, upon the duly constituted agent; the substitutional method is to be followed only when prompt personal service appears by affidavit to be unavailable. Rule 146 regulates substituted service of process. Rule 167 covers miscellaneous proceedings in the progress of litigation, but is not to be used so as to nullify the special Rule applicable to writs of summons. And where the plaintiff shewed that he knew where the head office of the defendants, a foreign corporation, was, and that they had no office or definite place of business within Ontario, and there was nothing to shew that they could not be easily served at the head office, an order for substituted service was vacated. The Court declined to consider the question whether the defendants had waived proper service by entering a conditional appearance, there having been no evidence before the Chancellor that an appearance had been entered, and he having refused to consider it. *Young* v. *Dominion Construction Co.*, 20 Occ. N. 169, 19 P. R. 139.

4. Fraud — *Foreigner—Judgment—Sale of lands—Title—Leave to defend.*]—In an action by judgment creditors of a company for a declaration that the individual defendants were trustees of certain lands for the company and for a sale of such lands and payment of the plaintiffs' claim out of the proceeds, an order was made for substituted service by mail of the writ of summons upon H., one of the defendants, upon an affidavit of the plaintiffs' solicitor shewing that the writ had been sent to a certain person for service in Alaska, and exhibiting a letter from that person giving the name of H.'s employer and certain information about him, but not stating definitely where he was. Proof of service in the way directed by the order having been given, and none of the defendants appearing, judgment was entered for the plaintiffs, and the lands sold thereunder: — *Held*, that the order for substituted service had been granted on sufficient material. 2. That no fraud on the part of the plaintiffs had been shewn. 3. Following *Moore* v. *Martin*, 1 N. W. T. Reps., part 2, p. 48, that service of the writ itself upon H., though a foreigner out of the jurisdiction, was neither a nullity nor irregular. 4. That, although H. had no actual notice of the proceedings, the Court had jurisdiction to deal with his interest in the property, and the title of the purchaser should not be interfered with. 5. But, as H. had disclosed a defence on the merits, he should be let in to defend upon terms. *Conrad* v. *Alberta Mining Co.*, 20 Occ. N. 108.

VI. Small Debt Procedure, N.W.T.

1. Meaning of "debt" — *Claim for wrongful dismissal.*]—A claim by a servant hired by the month against his master for wrongful dismissal in the middle of the month, is not a claim or demand for debt within the terms of s. 602 of the Judicature Ordinance, and proceedings to recover the same cannot be taken under the small debt procedure. Where, however, the plaintiff has brought an action for such a claim under the small debt procedure, and it appears that the defendant has not been in any way prejudiced, the Court will, under the power given by s. 538 of the Judicature Ordinance, direct that the writ of summons and the service thereof shall stand, but that the action shall continue as an action under the large debt procedure. *McNeilly* v. *Beattie*, 20 Occ. N. 292.

2. Place of issue.]—In a small debt action, in the N. W. T., where the cause of action arises within the district of the deputy clerk, and the defendant resides within the district, the writ of summons must be issued out of the office of the deputy clerk of the district, and a writ issued by the chief clerk of the judicial district from his own office will be set aside as irregular. *Sharples* v. *Powell*, 20 Occ. N. 291.

WRONGFUL DISMISSAL.

See Master and Servant, III. 2.

SUPPLEMENT TO ANNUAL DIGEST.

BRIEF DIGEST OF UNREPORTED ONTARIO CASES

(Compiled from the Newspaper Reports of proceedings at Osgoode Hall.)

CASES IN WHICH WRITTEN OPINIONS WERE DELIVERED BY THE JUDGES.

ABATEMENT.

See Will, 5, 14.

ACCELERATION.

See Landlord and Tenant, 4—Mortgage, 4.

ACCOUNT.

Sale of goods—Joint benefit—Sacrifice—Damages: Fisken v. Webb, 7th April (Trial) Falconbridge, J. (Reporter, Mr. Boomer.)

See Administration, 4—Contract, 3—Mortgage, 2, 5—Partnership, 1, 2, 3, 5, 9—Principal and Agent, 5—Trusts and Trustees, 1, 2—Vendor and Purchaser, 1.

ACQUIESCENCE.

See Fixtures—Railways and Railway Companies, 6 — Trusts and Trustees, 9.

ACTION.

1. Joinder of causes of action—Breach of promise—Seduction — Election to proceed with one—Rule 185—Reference of motion to Divisional Court under s. 81 (2) of Judicature Act: Patterson v. McKinnie, 6th April (Chambers) Boyd, C. (Reporter, Mr. Rolph.)

2. Joinder of causes of action—Election: Sterling v. Diamond Machine and Screw Co., 7th June (Chambers) Robertson, J. (Reporter, Mr. Rolph.) 12th June (Divisional Court) Boyd, C., Ferguson, J., Meredith, J. (No written opinion.)

See Costs, 9—Insurance, 8—Water and Watercourses, 5.

ADMINISTRATION.

1. Action for—Judgment—Further directions—Costs: Knox v. McNeilly, 7th April (Weekly Court) Robertson, J. (Reporter, Mr. Brown.)

2. Summary order for—Application of administrator — Situation of difficulty—Conduct of reference — Payment into Court: In re Duffin — Whistle v. Smith, 15th March (Weekly Court) Armour, C.J. (Reporter, Mr. Boomer.)

3. Summary order for — Necessity for order—No personal estate—Legatees —Notice to, of application—Charge on land — Executors—Costs—Appeal from order—Time for: Re Pearson, Thomas v. Auld, 20th Jan. (Chambers) Robertson, J. (Reporter, Mr. Rolph.)

4. Summary order for—Rule 616—Discretion to refuse—Rule 934—Executors — Accounts passed before Surrogate Court: Alexander v. Alexander, 23rd March (Weekly Court) Falconbridge, J. (Reporter, Mr. Lefroy.)

See Costs, 3—Payment of money out of Court, 2.

ADMINISTRATOR.

See Devolution of Estates Act—Executors and Administrators.

ADULTERY.

See Husband and Wife, 2.

AFFIDAVITS.

See Company, 5—Husband and Wife, 1.

ALIMONY.

See Husband and Wife, 1.

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See Conversion, 1 — Negligence, 3 — Railways and Railway Companies, 3.

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APPEAL.

1. Report of Master—Refusal to interfere: Merner v. Brodrecht, 23rd March (Weekly Court) Falconbridge, J. (Reporter, Mr. Lefroy.)

2. Report of Master—Refusal to interfere: Highland v. Sherry, 6th April (Weekly Court) Falconbridge, J. (Reporter, Mr. Lefroy.)

3. Report of Master—Refusal to interfere: Moffatt v. Pounder, 12th April (Weekly Court) Armour, C.J. (Reporter, Mr. Boomer.)

4. Report of Master—Reversal on facts: McWilliams v. Davidson, 6th Oct. (Weekly Court) Boyd, C. (Reporter, Mr. Boomer.)

5. Report of Referee—Refusal to interfere: Hendershot v. Sooysmith Co., 28th March (Weekly Court) Armour, C.J. (Reporter, Mr. Harman.)

6. To Court of Appeal—Leave to appeal—Special circumstances—Arrest—Terms: Beam v. Beatty, 19th Oct. (Court of Appeal—Chambers) Moss, J.A. (Reporter, Mr. Rolph.)

See Administration, 3 — Assessment and Taxes, 1—Costs, 7, 8—Mandamus—Will, 2.

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ARBITRATION AND AWARD.

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ASSESSMENT AND TAXES.

1. Illegal assessment—Action to restrain enforcement—Land of railway company—Rails, ties, and poles—Notice—Appeal: Canada Atlantic R. W. Co. v. Township of Cambridge, 27th June (Trial) Rose, J. (Reporter, Mr. Brown.)

2. Tax sale—Conduct of auction—Compliance with statute—Setting aside: Ruttan v. Oakley, 27th Nov. (Trial) Robertson, J. (Reporter, Mr. Boomer.)

3. Tax sale—Invalidity — Setting aside—Improvements—Removal of buildings: Ruttan v. Graham, 27th Nov. (Trial) Robertson, J. (Reporter, Mr. Boomer.)

See Municipal Corporations, 2, 15, 22.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See Trusts and Trustees, 2.

ASSIGNMENT OF CHOSE IN ACTION.

See Chose in Action.

ASSIGNMENTS AND PREFERENCES.

See Bankruptcy and Insolvency.

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Storage of grain—Recovery for loss: Campbell v. Wood, 20th April (Trial) Falconbridge, J. (Reporter, Mr. Brown.) 13th Nov., Court of Appeal (Reporter, Mr. Cassels.)

BANKRUPTCY AND INSOLVENCY.

1. Action by creditors, in name of assignee, to set aside fraudulent conveyances by insolvent to wife — Order authorizing action under R. S. O. c. 147, s. 9, s.-s. 2—Benefit of particular creditors or general body—Pleading: Poole v. Lefaive, 3rd April (Div'l Court) Armour, C.J., Falconbridge, J., Street, J. (Reporter, Mr. Harman.)

2. Transfer of shares — Husband and wife—Bona fides — Preference—Assignments Act: American Branch India Tea Co. v. Hudson, 7th Nov. (Trial) Rose, J. (Reporter, Mr. Harman.)

See Company, 2-5—Trusts and Trustees, 2.

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BENEFIT SOCIETY.

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See Street Railways, 5—Way, 6.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Promissory note—Absence of consideration—Notice — Indemnity — New trial: Murray v. Wurtele, 29th June (Div'l Court) Armour, C.J., Falconbridge, J. (Reporter, Mr. Brown.)

2. Promissory note — Alteration—Addition of words—Subsequent erasure—Effect of—Substituted note—Absence of name — Condition — Notice: La Banque Provinciale v. Arnoldi, 2nd Nov. (Trial) Street, J. (Reporter, Mr. Boomer.)

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4. Promissory note — Presentment and notice — Liability of indorsers to payees — Question not raised by pleadings — Objection on face of instrument: Ducret v. Carr, 6th Feb. (Div'l Court) Meredith, C.J., Rose, J., MacMahon, J. (Reporter, Mr. Boomer.)

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3. Winding-up—Order for — Liquidator: In re Chatham Banner Printing Co., 22nd August (Weekly Court) MacMahon, J. (Reporter, Mr. Harman.)

4. Winding-up—Petition for order—Dismissal—Costs: In re Imperial Woollen Mills Co., 31st May (Chambers) Boyd, C. (Reporter, Mr. Rolph.)

5. Winding-up—Petition for order—Evidence of insolvency—Corporate act—Affidavit of president — Absence of assets: In re North Toronto Floral Co., 17th Dec. (Chambers) Boyd, C. (Reporter, Mr. Lefroy.)

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10. Manufacture of goods — Breach — Damages—Return of amount paid: Leggo v. Welland Vale Mfg. Co., 8th Nov. (Trial) MacMahon, J. (Reporter, Mr. Harman.)

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3. Apportionment—Widow and children of deceased—Lord Campbell's Act—Money in Court — Costs — Maintenance: McDonald v. Grand Trunk R. W. Co., 1st Oct. (Trial) Boyd, C. (Reporter, Mr. Boomer.)

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4. Fraudulent representations as to credit—Election to affirm contract—Estoppel: Bouch v. Henderson—Re Army and Navy Clothing Co., 6th Jan. (Div'l Court) Armour, C.J., Falconbridge, J. (Reporter, Mr. Brown.) 23rd May, Court of Appeal (Reporter, Mr. Cassels.)

5. Lumber—Property passing—Delivery to culler—Bill of sale—Reservation of right of disposition — Consignment: Piggott v. Roach, 5th July (Div'l Court) Armour, C.J., Falconbridge, J., Street, J. (Reporter, Mr. Brown.)

6. Non-delivery—Action for damages by purchaser—Right of vendor to rescind—Place and time of delivery—Notice to deliver — Reasonableness: Evans v. Valentine, 1st March (Div'l Court) Meredith, C.J., Rose, J., MacMahon, J. (Reporter, Mr. Boomer.)

7. Refusal to accept — Breach of contract—Damages: Stevens v. William Hamilton Mfg. Co., 12th Nov. (Trial) Ferguson, J. (Reporter, Mr. Lefroy.)

8. Refusal to accept — Completed contract — Breach—Damages: Ennis v. McAllister Milling Co., 7th Nov. (Trial) Ferguson, J. (Reporter, Mr. Harman.)

9. Timber—Property passing — Destruction by fire — Costs: Wilson v. Shaver, 6th July (Trial) Rose, J. (Reporter, Mr. Brown.)

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2. Separate school trustees—Contract—Payment of commission on loan—Intra vires — Seal — Executed contract: Kilt v. Ottawa R. C. Separate School Trustees, 12th Dec. (Div'l Court) Boyd, C., Ferguson, J., Robertson, J. (Reporter, Mr. Boomer.)

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1. Agreement to devise land—Compensation for services to testator—Enforcement against executor: Ruport v. Warner, 18th Dec. (Trial) Robertson, J. (Reporter, Mr. Brown.)

2. Contract for sale and purchase of land — Correspondence: Wigle v. Harris, 23rd Feb. (Weekly Court) Ferguson, J. (Reporter, Mr. Boomer.)

3. Contract for sale and purchase of land—Misrepresentation — Mistake: Quimby v. Cust, 28th Dec. (Trial) Rose, J. (Reporter, Mr. Boomer.)

4. Contract for sale and purchase of land—Statute of Frauds—Execution of deed and mortgage—Delivery in escrow: Grieve v. Fitzpatrick, 3rd Dec. (Trial) Boyd, C. (Reporter, Mr. Harman.)

5. Contract for transfer of shares—Payment into Court—Costs: Parsons v. Palmer, 11th May (Trial) Robertson, J. (Reporter, Mr. Brown.)

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2. Contract with municipality—Release of company — Illegality—Action by ratepayer: Broom v. Toronto Suburban Street R. W. Co., 4th May (Trial) Rose, J. (Reporter, Mr. Boomer.)

3. Ejection of passenger — Assault — Findings of jury: Lewis v. London Street R. W. Co., 16th Jan., Court of Appeal (Reporter, Mr. Cassels.)

4. Injury to passenger — Negligence — Contributory negligence—New trial: Edwards v. London Street R. W. Co., 16th Oct., Court of Appeal (Reporter, Mr. Cassels.)

5. Injury to person riding bicycle—Contributory negligence: Logan v. London Street R. W. Co., 28th March (Div'l Court) Armour, C.J., Street, J. (Reporter, Mr. Lefroy.)

6. Raising grade of highway—Injury to adjoining property — Recovery by land-owner against municipality—Liability of company to indemnify: Village of Hintonburg v. Ottawa Electric R. W. Co., 16th Jan., Court of Appeal (Reporter, Mr. Cassels.)

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2. To land—Boundaries — Removal of fence — Injunction: Job v. Gotlib, 12th Feb. (Trial) MacMahon, J. (Reporter, Mr. Boomer.)

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2. Jury notice—Motion to strike out—Leaving to trial Judge: Lloyd v. Pegg, 24th Oct. (Chambers) Falconbridge, C.J. (Reporter, Mr. Rolph.)

3. Postponement — Grounds for—Effect on pending criminal trial—Discrediting witness—Jury notice: Fitzgerald v. Morden, 15th Nov. (Chambers) Meredith, J. (Reporter, Mr. Rolph.) 20th Dec. (Div'l Court) Falconbridge, C.J., Street, J. (Reporter, Mr. Rolph.)

4. Preliminary trial of question of law—Motion for order directing: Murphy v. London and Canadian L. & A. Co., 31st March (Chambers) Falconbridge, J. (Reporter, Mr. Rolph.)

5. Refusal to postpone — Dismissal of action—New trial—Terms: Smith v. Mallory, 29th Nov. (Div'l Court) Meredith, C.J., Rose, J. (Reporter, Mr. Harman.)

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4. Evidence of trust—Parol declaration—Devise of estate subject to trust: Murr v. Squire, 29th June, Court of Appeal (Reporter, Mr. Cassels.)

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6. Investments — Liability of executors of co-trustee—Securities — Interest: Collins v. Burwell, 23rd Nov. (Weekly Court) Meredith, C.J. (Reporter, Mr. Brown.)

7. Loss to trust estate—Action of trustee—Liability of co-trustee—Appeal from Master's report—Refusal to interfere: In re Bailey—Bailey v. Ball, 11th July (Weekly Court) Ferguson, J. (Reporter, Mr. Boomer.)

8. Purchaser at sheriff's sale—Trustee for execution debtor — Action for declaration of trust—Illegal agreement—Defrauding creditors—Pleading: Smith v. Scott, 20th June (Trial) Street, J. (Reporter, Mr. Boomer.)

9. Sale of subject of trust—Shares in company — Unjustifiable sale—Liability of trustee—Delay in suing—Acquiescence — Trustee Limitation Act: Hunter v. Purdy, 1st March (Trial) Falconbridge, J. (Reporter, Mr. Harman.)

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2. Contract for sale and purchase of land—Action by vendor for purchase price—Possession taken by purchaser—Judgment for price—Failure to realize by execution — Subsequent order rescinding contract — Validity of—Specific performance: Jackson v. Scott. 15th March (Div'l Court) Boyd, C., Ferguson, J. (Reporter, Mr. Harman.)

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2. Ditches and Watercourses Act—Municipality digging ditch—Objection by land-owner—Demand for compensation — Filling in ditch — Injunction against: Township of Chinguacousy v. McLellan, 17th Jan. (Div'l Court) Boyd, C., Ferguson, J. (Reporter, Mr. Boomer.)

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5. Highway — Declaratory judgment — Obstruction—Municipal corporations: City of Toronto v. Hughes, 3rd Nov. (Trial) Ferguson, J. (Reporter, Mr. Boomer.)

6. Injury to person riding bicycle—Non-repair of highway—Reasonable state of repair: Jones v. Township of Westminster, 29th May (Trial) Street, J. (Reporter, Mr. Harman.)

7. Non-repair of highway — Injury to traveller—Dangerous place—Absence of guard: Renshaw v. Township of West Oxford, 11th July (Trial) MacMahon, J. (Reporter, Mr. Boomer.)

8. Non-repair—Negligence of municipal corporation — Workman leaving trestle on highway—Injury to street railway conductor — Contributory negligence: Lambert v. City of Hamilton, 13th Feb. (Trial) MacMahon, J. (Reporter, Mr. Boomer.)

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3. Annuity—Charge on corpus—Arrears: Daly v. Hamilton, 8th Jan. (Trial) MacMahon, J. (Reporter, Mr. Lefroy.)

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5. Construction—Annuity — Deficiency in income—Abatement: In re Likins, 15th Oct. (Chambers) Meredith, J. (Reporter, Mr. Brown.)

6. Construction—Ascertainment of assets of estate—Distribution—Widow: In re Williamson, 9th March (Chambers) Falconbridge, J. (Reporter, Mr. Brown.) 2nd April (Div'l Court) Meredith, C.J., MacMahon, J. (No written opinion.)

7. Construction — Assets of estate — Agreement—Conveyance — Executor —Funeral expenses: Fitzgerald v. Fitzgerald, 19th March (Weekly Court) Falconbridge, J. (Reporter, Mr. Lefroy.)

8. Construction—"At the same time" — Death of testator and wife — "By accident or otherwise": Henning v. Maclean, 19th Nov. (Trial) Falconbridge, C.J. (Reporter, Mr. Brown.)

9. Construction—Discretion of executors —Beneficiaries of fund — Income— Distribution: McCarthy v. Hornsby, 4th April (Chambers) Boyd, C. (Reporter, Mr. Harman.)

10. Construction—Distribution of estate —Shares of sons—Executors—Discretion—Interest—Assignment of share: Cooper v. Noble, 3rd April (Trial) Ferguson, J. (Reporter, Mr. Boomer.)

11. Construction — Estate for life — Charge for payment of legacies — Dower: In re Fenner, 3rd Oct. (Chambers) Boyd, C. (Reporter, Mr. Boomer.)

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13. Construction—Intestacy as to real estate: Jordan v. Butler, 27th June (Trial) Meredith, C. J. (Reporter, Mr. Brown.)

14. Construction — Legacies—Abatement —Deficiency of assets — Priorities— Mortmain — Funds — Distribution: Kennedy v. Methodist Church of Canada, 15th Jan. (Chambers) Armour, C.J. (Reporter, Mr. Harman.) 26th March (Div'l Court) Meredith, C.J., MacMahon, J. (Reporter, Mr. Boomer.)

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19. Construction — Survivorship — Ascertainment of persons entitled — Death of testator — Period of distribution: Teetzel v. Bawtinhimer, 10th July (Div'l Court) Armour, C. J., Falconbridge, J., Street, J. (Reporter, Mr. Brown.)

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22. Widow's election—Dower—"Heirs"— Ascertainment of class at death of testator—Annuities — Lives of corporate bodies — Mortgage—Gift to designated persons — Grandchildren: In re McIntyre Estate, 24th Sept. (Weekly Court) Meredith, C.J. (Reporter, Mr. Brown.)

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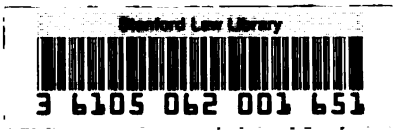
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